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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CSXT, INC.,
Petitioner,

vs.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN

and

UNITED TRANSPORTATION UNION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether The Locomotive Boiler Inspection Act, 45 U.S.C. § 22 et. seq. (LBIA) totally occupies the field of locomotive equipment regulation, thus providing the basis for a facially conclusive preemption challenge to the Michigan Department of Transportation (MDOT) rule requiring locomotives to be equipped with toilets.

II.

Whether the Federal Railroad Safety Act, 45 USC § 421 et. seq. (FRSA) prohibits concurrent state and statewide regulation of locomotive equipment, thus providing the basis for a facially conclusive preemption challenge to the MDOT rule requiring locomotives to be equipped with toilets.

III.

Whether Younger abstention is appropriate in cases which raise facially conclusive preemption claims.

IV.

Whether state administrative proceedings can be considered judicial in nature for purposes of Younger abstention when the state constitution, statutes and state court decisions expressly deny judicial powers to such agency, where such agency has no power to assess fines, compel compliance with its orders, or impose liability, and where such agency serves as both adversary and decision maker.

LIST OF PARTIES AND RULE 28.1 LIST

The parties before the Court of Appeals and this Court are all listed in the caption.

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
The Baltimore and Philadelphia Railroad Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company;
Dayton and Union Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company;
Mid-Allegheny Corporation

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CSXT, Inc., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, p. B-1-B-12) is reported at 883 F.2d. 468. The opinion of the District Court (App. D, p. D-1-D-10) is reported at 699 F. Supp 127.

JURISDICTION

The judgment of the Court of Appeals (App. A, pp. A-1-2) was entered on August 22, 1989. A petition for rehearing was denied on October 4, 1989. (App. C, p. C-1). Pursuant to Supreme Court Rule 20.4, this petition is timely filed on or before January 2, 1990. Jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Article 1, § 8, Clauses 1 and 3 of the United States Constitution provide in relevant part:

> The Congress shall have the power—To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. Article 6, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Locomotive Boiler Inspection Act, 45 USC § 22, et seq, provides in relevant part at § 23:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22

to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

4. The Federal Railroad Safety Act, 45 USC § 421, et. seq. (FRSA) provides in relevant part at § 434:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

5. Federal Railroad Administration Regulations dealing with locomotive equipment are set forth verbatim in Appendix E and are identified here as: 49 CFR 229, 230, 231.16, 213.17, 231.29, 231.30, 232.19 and 49 CFR 223.

6. Article III, § 2 of the Constitution of the State of Michigan provides:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

7. The following relevant Michigan statutes are set forth verbatim in Appendix F to illustrate the absence of judicial power in the Michigan Department of Transportation.

> MICH. COMP. LAWS ANN. §§ 460.302; 460.558; 462.19; 462.26(a), (c); 462.38; 467.10; 469.9; 469.37; and 469.103.

8. Rule 460.1473 MICH. ADM. CODE, provides in relevant part:

> (a) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

STATEMENT OF THE CASE

The facts are not in dispute. The Michigan Department of Transportation (MDOT) adopted a Rule (Mich ADM Code Rule 460.1473 (a)) which it interprets to require toilets on locomotives in Michigan. CSXT, an interstate railroad system operating in Michigan and many states, uses some locomotives in Michigan that are not equipped with toilets.

In 1986, upon complaint of intervenor, United Transportation Union (UTU), MDOT conducted field inspections, issued requirements for compliance and gave notice of an administrative hearing to enforce the Rule. (App. G, pp G-1-G-17). CSXT filed its Complaint in the Federal District Court asserting total federal preemption of the regulation of locomotive equipment by virtue of two federal statutes, the Locomotive Boiler Inspection Act (LBIA), 45 USC § 22-43 and the Federal Railroad Safety Act of 1970 (FRSA), 45 USC § 421-44. CSX then moved to stay the administrative hearing which motion was denied by MDOT's Administrative Law Judge. (App. G, pp. G-18-G-19). CSXT sought and obtained from the District Court a preliminary injunction against MDOT's enforcement of its Rule.

On May 13, 1988, the District Court granted CSXT's Motion for Summary Judgment declaring that MDOT's Rule was preempted by LBIA and FRSA insofar as it requires commodes on locomotives operating in Michigan.

On appeal by defendants, the Sixth Circuit Court of Appeals ruled that the District Court should have abstained,

vacated the judgment and remanded the case with instructions to dismiss. On motion, the Mandate was stayed. (App. H, p. H-1).

In bringing this case within the guidelines of *Younger* abstention, the Court of Appeals made four distinct findings challenged here:

1. That the LBIA does not prohibit concurrent state regulation or purport to occupy the field of railroad regulation;

2. That the FRSA allows limited concurrent state regulation;

3. That MDOT's administrative proceedings were judicial in nature; and

4. That Younger abstention applies in this case.

The bases for federal court jurisdiction in this case in the first instance are:

28 USC § 1331—This civil action arises under the constitution and laws of the United States, specifically Article I, § 8, Clause 3 (the Commerce Clause) and Article VI, Clause 2 (the Supremacy Clause) and the Locomotive Boiler Inspection Act, 45 USC, § 22-43 and the Federal Railroad Safety Act of 1970, 45 USC, § 421-44.

28 USC § 1337—This is a civil action arising under the LBIA and the FRSA, being acts of Congress regulating commerce or protecting trade and commerce against restraints.

28 USC § 1332—The matter in controversy is between citizens of different states and exceeds the statutory amount.

REASONS FOR GRANTING THE PETITION

1. **The Court of Appeals has rendered a decision in conflict with the decisions of this Court and of other federal courts of appeal concerning the Locomotive Boiler Inspection Act's 45 USC § 22 et. seq. (LBIA), total occupation of the field of locomotive equipment regulation and its total preemptive effect.**

The Court of Appeals held that the LBIA,

> "lists certain equipment required for locomotives and railroad cars . . . does not prohibit concurrent state regulation or purport to occupy the field of railroad [regulation]*." (App. B, p. B-4).

*Misprinted in the text of the opinion as "negotiation".

This holding is in conflict with the decisions of this Court and of other federal courts of appeal which hold unequivocally, that the LBIA occupies totally the field of locomotive equipment regulation and preempts states from any and all requirements concerning locomotive equipment.

In *Napier* vs. *Atlantic Coastline*, 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926), this Court held that Congress intended the LBIA to occupy totally the field of locomotive equipment.[1] The Court found that the LBIA preempted a Georgia statute requiring automatic doors to fireboxes on

[1] The doctrine of preemption is based on the Supremacy Clause of the United States Constitution, Article VI, Cl.2, which mandates that federal law overrides conflicting state law. Congressional intent determines whether federal law preempts a particular state or local law. *Wardair Canada* vs. *Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986). Preemptive intent may be indicated by express statutory language. *Fidelity Federal Savings and Loan Assoc.* vs. *de La Cuestra*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d, 664. Or, preemptive intent is inferred where federal law so pervades a given field as to evince a Congressional intent exclusively to occupy the field. *Silkwood* vs. *Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d, 443 (1984).

locomotives, and a Wisconsin statute requiring cab curtains on locomotives. The Court examined § 23 of the LBIA and concluded,

> "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission [2] leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose." *Id.* at 613, 47 S. Ct. at 210.

Napier's holding concerning the LBIA's total preemption of locomotive equipment regulation has been reaffirmed by recent decisions of this Court and three federal courts of appeal. In *Consolidated Rail Corp.* vs. *Pennsylvania Public Utilities*, 536 F. Supp. 653 (E.D. Pa., 1982), *aff'd mem.* 696 F. d 981 (CA 3, 1982), *aff'd sum. sub. nom., Pennsylvania Public Utilities Comm'n vs. Consolidated Rail Corp.*, 461 U.S. 912, 103 S. Ct. 1888, 77 Ed. 2d 280 (1983), the district court ruled that the LBIA preempted a state speed recorder statute because the speed recorder statute regulated locomotive equipment and the LBIA totally preempts state regulation of locomotive equipment. The Third Circuit and the Supreme Court summarily affirmed this judgment.

The Ninth Circuit reaffirmed the Napier holding in *Marshall* vs. *Burlington Northern Inc.*, 720 F. 2d 1149 (CA 9, 1983), a grade crossing accident case involving allegations that the railroad had failed to provide strobe lights on its locomotives. Justice Kennedy, then sitting on the court of appeals, cited the holding in *Napier* and stated,

> "... the [LBIA] preempts any state regulations of locomotive equipment." *Id.*, at 1152.

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[2] "Secretary of Transportation" was substituted for "Interstate Commerce Commission" pursuant to Pub. L. 589-670, 49 USC § 1655 (e)(1)(E). The Federal Railroad Administration carries out the powers and duties of the Locomotive Boiler Inspection Act vested in the Secretary of Transportation. 49 USC § 103.

In *Missouri Pacific Railroad Co.*. vs. *Railroad Comm'n of Texas (MOPAC I)*, 833 F. 2d 570 (CA 5, 1987) the Fifth Circuit affirmed the district court's ruling that the LBIA preempted a Texas regulation requiring first aid kits and fire extinguishers on locomotives. The court of appeals announced,

> "We hold that the state legislation is precluded because the [LBIA] . . . was intended to occupy the field." *Id.*, 833 F.2d at 576.

The court further noted,

> "State attempts to prescribe any locomotive safety equipment must necessarily fail." *Id.*, 833, F. 2d at 576, n. 7.

Most recently, the same court of appeals strongly reaffirmed this position stating,

> "Yet there is nothing clearer in the law than the fact that locomotives themselves are subject to no regulations, requirements, or additions to equipment at all." *Missouri Pacific Railroad Co.* vs. *Railroad Comm'n of Texas (MOPAC II)*, 850 F. 2d 264, 269 (CA 5, 1988), citing *Napier*, 272 US at 613, 47 S. Ct. 210.

In the instant case, the Court of Appeals' incorrect assessment of the LBIA's total occupation of the field of locomotive equipment, and total preemptive effect concerning any and all regulation of locomotive equipment by the states, prevented that court from properly identifying CSXT's preemption claim as facially conclusive. Failing to so identify CSXT's preemption claim, the Court of Appeals erroneously construed and applied the Supreme Court's recent decision concerning Younger abstention in *New Orleans Public Service, Inc.* vs. *Council of City of New Orleans (NOPSI)*, ____ U.S. ____, 109 S. Ct. 2506, ____ L. Ed. 2d ____(1989).

2. The Court of Appeals has rendered a decision in conflict with the decisions of other federal courts of appeal concerning preemption of concurrent state and statewide regulation of locomotive equipment under the Federal Railroad Safety Act, 45, USC § 421 et. seq. (FRSA).

The Court of Appeals held that the FRSA allows the Secretary of Transportation to:

> "prescribe appropriate rules for all areas of railroad safety," including rules concerning equipment and operating procedures. (Citing FRSA § 431 (a)). The Act allows limited concurrent state regulation. (App. B, p. B-4).

This ruling is in conflict with the decisions of the federal court of appeals for the Fifth Circuit, which hold that virtually all state regulations affecting the train itself appear preempted by FRSA. *MOPAC II*, 850 F. 2d at 268. This ruling is also in conflict with the Fifth Circuit's broad approach to construing "subject matter", *MOPAC I*, 833 F. 2d 570, which approach leads to identifying the "subject matter" in the case at bar as "locomotive equipment". FRSA, then, prohibits concurrent state and statewide regulation of locomotive equipment because federal regulations cover that subject matter.

FRSA § 434, preempts a state railroad safety regulation with statewide application if the Secretary of Transportation (see fn 2, supra) has adopted a rule covering the subject matter of such state requirement. The legislative history of FRSA makes it clear that:

> "there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter." 1970 U.S. Code Cong. & Admin. News at 4117.

A broad approach to construing "subject matter" is consistent with Congress' stated intent in § 434 to provide for

safety through nationally uniform railroad regulation. A broad construction of "subject matter" leads to limited state regulation, fulfilling Congress' stated purpose of national uniformity. A narrow construction of "subject matter" permits states extensively to regulate where the Federal Railroad Administration (FRA) may have regulated comprehensively, though not exhaustively. Such an approach would promote piecemeal and fragmentary regulation by the states, effectively destroying national uniformity. As is evident from its analysis in *MOPAC I*, 833 F. 2d 570, the Fifth Circuit has adopted a broad construction of "subject matter". Such an approach supports its conclusion in *MOPAC II* that the FRSA preempts virtually all state regulation of the train itself, since "the FRA has regulated most aspects of train safety." *MOPAC II*, 850 F. 2d at 268.

The Fifth Circuit, in *MOPAC I, supra*, rejected the "purpose of the state regulation" as "too mincing" a construction of whether FRA regulations "cover the subject matter", because such a construction would "thwart federal superintendence of the field." *Id.*, at 574. Instead, that court looked at whether, from a practical standpoint, state requirements generally add to FRA requirements. *Id*, at 575. Also, that court considered whether the physical area covered by the state regulation was under the domain of the FRA. *Id.*, at 577. If so, the subject matter was covered by federal regulation. Applying these tests, it is apparent that the FRA has covered the subject matter of MDOT's rule.

The subject matter of locomotive equipment is extensively, though not exhaustively, covered by federal regulations. (See FRA regulations, App. E.) Since federal regulations "cover the subject matter", FRSA preempts MDOT's rule requiring locomotives to be equipped with toilets. Following the reasoning of the Fifth Circuit, and in contrast to the holding of the Sixth Circuit in the instant case, FRSA does not allow for concurrent state and statewide regulation of locomotive equipment.

See also *Rayner* vs. *Smirl*, 873 F.2d 60 (1989), wherein the Fourth Circuit held FRSA so completely preemptive of state law as to warrant removal of a state court action to federal court, where it was then dismissed on preemption grounds. Thus, the Fourth Circuit has joined the Fifth in confirming the total preemptive effect of FRSA.

The Sixth Circuit's incorrect assessment of FRSA's preemption of state locomotive equipment regulation prevented that court from properly identifying CSXT's preemption claim as facially conclusive. Failing to so identify CSXT's preemption claim, the Court of Appeals erroneously construed and applied the Supreme Court's recent decision concerning Younger abstention in *NOPSI*, *supra*.

3. The Court of Appeals has decided an important question of federal law, the appropriateness of Younger abstention in facially conclusive preemption claims, which question has not been, but should be, settled by this Court.

Ruling that the district court should have abstained from deciding CSXT's preemption claim, the Court of Appeals held,

> "We do not see any reason to analyze abstention cases involving a preemption claim differently than other abstention cases." (App. B, p. B-9).

Relying on *NOPSI*, the Court of Appeals wrote that the Supreme Court:

> "rejected the argument that the presence of a preemption question bars a court from applying Younger abstention." (App. B, p. B-5).

The Court of Appeals looked only to the *NOPSI* conclusion that Younger abstention can be extended to *substantial* claims of federal preemption. The Court of Appeals did not acknowledge that CSXT presented a facially conclusive preemption claim, that *NOPSI* distinguished between "sub-

stantial" preemption claims and "facially conclusive" preemption claims, and that the decision in *NOPSI* dealt only with substantial preemption claims. *NOPSI* specifically left open the question of the appropriateness of Younger abstention in facially conclusive preemption cases. This important question of federal law deserves the attention of this Court.

Writing for the majority in *NOPSI*, Justice Scalia framed the issue for the instant case.

> Thus, NOPSI argues, even if a *substantial* claim of federal preemption is not sufficient to render abstention inappropriate, at least a *facially conclusive* claim is. Perhaps so. But we do not have to decide the matter here, since the proceeding and order do not meet that description. *NOPSI*,____ U.S. ____, 109 S. Ct. at 2517.

The opinion then proceeds to outline the reasons why NOPSI's preemption claim was not facially conclusive.

a. CSXT's preemption claim is facially conclusive.

The factors presented in *NOPSI* which lead to the conclusion that NOPSI did not involve a facially conclusive preemption claim, lead to the opposite conclusion in the instant case. MDOT has sought directly to regulate equipment on CSXT locomotives used in interstate commerce. MDOT has questioned the validity of the LBIA and FRSA-prescribed allocation of power concerning regulation of locomotive equipment. In attempting to regulate locomotive equipment, MDOT has not taken a normal administrative step within its jurisdiction. Regulation of locomotive equipment is directly foreclosed by the LBIA, the FRSA, the regulations supplementing those statutes, and the case law applying them. Moreover, as CSXT, MDOT, the UTU and the Court of Appeals agree, in this case, "the facts are not in dispute." (App. B, p. B-2). No further factual inquiry is required for purposes of the threshold abstention determination that MDOT's rule and proceedings are "flagrantly and patently" unlawful.

b. Younger abstention should not be extended to facially conclusive preemption claims.

Over the past eighteen years, the application of Younger abstention has been broadened by this Court from criminal court proceedings, *Younger* vs. *Harris*, 410 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) to quasi-criminal court proceedings, *Huffman* vs. *Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975), to civil state court proceedings involving important state interests, *Pennzoil Co.* vs. *Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987), to state administrative proceedings involving important state interests, *Ohio Civil Rights Comm'n* vs. *Dayton Christian Schools*, 477 U.S. 619, 106 S. Ct. 2718, 71 L. Ed. 2d 1 (1986).

While these rulings progressively bar federal plaintiffs from access to federal courts, this Court continues to acknowledge that abstention is "the exception, not the rule", *NOPSI* ____ U.S.____, 109 S. Ct. at 2513; that the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging", *NOPSI*, ____ U.S.____, 109 S. Ct. at 2513, quoting *Deakins* vs. *Monaghan*, 484 U.S. 193, 203, 108 S. Ct. 523, 530, 98 L. Ed. 2d 529 (1988); and that the "right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied". *NOPSI*, ____ U.S. ____, 109 S. Ct. at 2513, quoting *Willcox* vs. *Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S. Ct. 192, 195 53 L. Ed. 382 (1909). The Younger abstention decisions define the narrow class of cases in which federal courts have discretion to withhold authorized relief because of undue interference with state proceedings. Petitioner's case presents circumstances which demonstrate that facially conclusive preemption claims do not belong within this narrow class of cases.

Younger vs. *Harris*, (supra), set forth the abstention principle, but also held that abstention is not appropriate if a federal plaintiff will suffer irreparable injury absent equita-

ble relief. *NOPSI*, *supra* ____ U.S. at ____, 109 S. Ct. at 2517, citing *Younger*, 410 U.S. at 43-44, 91 S. Ct. at 750. *Younger* suggested that irreparable injury may be established by showing that the challenged state statute is "flagrantly and patently violative of express constitutional provisions." *NOPSI*, ____ U.S. at ____, 109 S. Ct. at 2517, citing *Younger*, 410 U.S. at 53-54, 91 S. Ct. at 755. Some preemption cases do involve state statutes, regulations, orders or proceedings which flagrantly and patently violate the Supremacy Clause of the United States Constitution. Such facially conclusive preemption claims should fall outside the reach of Younger abstention.

In *Public Utilities Comm'n of Ohio* vs. *United Fuel Gas Co.*, 317 U.S. 456, 63 S. Ct. 369, 87 L. Ed. 396 (1943), this Court refused to apply abstention to a facially conclusive preemption claim. The Supreme Court affirmed an order of a federal district court enjoining the state Public Utilities Commission of Ohio (PUCO) from attempting to directly regulate interstate gas prices. Deciding that abstention was inappropriate, this Court stated:

> "First, and most important, the orders of the state commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary to discover that they are in conflict with the federal Act. *Id.*, 317 U.S. at 468, 469, 63 S. Ct. at 376.

Supporting this conclusion, were the following facts noted by the Court. Congress specifically divested state agencies of any jurisdiction to regulate interstate rates when it passed the Natural Gas Act of 1938, 15 USC 8717, et. seq. In place of the supplanted state regulation, Congress had created a "comprehensive scheme of regulation" for interstate gas rates. *Id.*, 317 U.S. at 467, 63 S. Ct. at 375. Congress had also granted exclusive jurisdiction to the Federal Power Commission to regulate interstate gas rates. Moreover, there was no need in *United Fuel Gas* to look beyond the

face of the PUCO order and the Ohio statute permitting such order for the Court to determine that the state's actions and statute were preempted by the Natural Gas Act.[3]

The *United Fuel Gas* decision pre-dated *Younger* and the extension of Younger abstention to state administrative proceedings in *Dayton Christian Schools*, *supra*. *United Fuel Gas*, however, was cited with approval in *NOPSI*, ____ U.S. at ____, 109 S. Ct. at 2517. This Court should clarify that the decision and rationale of *United Fuel Gas* survive *Younger* and *Dayton Christian Schools*, and hold that Younger abstention is not appropriate in cases involving facially conclusive preemption claims.

To do so is consistent with the suggestion in *Younger* that abstention is not appropriate where a challenged state statute is flagrantly and patently violative of express constitutional prohibitions. Refusing to extend Younger abstention to facially conclusive preemption claims will not conflict with Younger abstention's goal of preventing undue interference with state proceedings. This is so because the interference is not "undue" when state proceedings involve flagrant and patent violations of constitutional prohibitions.

CSXT presented a facially conclusive preemption claim to the federal district court. The decision of the Court of Appeals improperly and needlessly bars Petitioner and other similarly situated federal plaintiffs from authorized federal

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[3] All of these aspects are present in CSXT's preemption claim. Congress, through the LBIA and FRSA, has divested the states of any jurisdiction to regulate locomotives. In place of state regulation, Congress has enacted a comprehensive scheme of federal regulation for locomotives and other railroad rolling stock. Through the LBIA and FRSA, Congress has granted the FRA exclusive power to regulate the subject matter of locomotive equipment. Moreover, in the instant case there is no need to look beyond the face of the MDOT rule, and the undisputed actions of MDOT enforcing the rule, to determine that MDOT's actions and rule are preempted by the LBIA and FRSA.

relief. This Court's ruling will resolve this important and as yet unanswered federal question.

4. The Court of Appeals has rendered a decision in conflict with applicable decisions of this Court and of the Michigan Supreme Court concerning the "judicial" nature of MDOT's administrative proceedings.

The Court of Appeals held that MDOT's administrative proceedings constitute an ongoing state proceeding that was judicial in nature. While some administrative proceedings may be judicial in nature, such is not the case respecting MDOT's administrative hearing.

The Michigan Constitution states:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution. Mich. Const., Art. III, § 2.

Referring to MDOT's predecessor, the Michigan Railroad Commission, the Michigan Supreme Court has stated:

> [The Michigan Railroad Commission] has no judicial or legislative powers, is an administrative [agency], and with reference to most matters committed to it . . . is a trier of facts. *Pollitz v. Michigan Railroad Commission*, 205 Mich 549, 566; 172 N.W. 611, 617 (1919). See also *Detroit & Mackinac Railway vs. Michigan Railroad Commission*, 235 U.S. 403, 404-405 (1914)

As to another predecessor of MDOT, the Michigan Public Utilities Commission, Michigan's Supreme Court later said:

> But the public utilities commission and other commissions of like character are primarily administrative bodies, adjuncts to either or both the legislative department or the executive department. They also function in quasi-judicial capacities. But because of constitutional

> prohibitions (Const. art. 5, § 1; art. 7, § 1) neither legislative powers nor purely judicial functions can be exercised by such commissions or boards. *In re Consolidated Freight Co.*, 265 Mich. 340 at 350 (1933).

Michigan's Constitution forbids the exercise of judicial powers by MDOT. It is a fact-finder and may issue orders as the legislature may authorize. It has no judicial power to assess fines or to compel compliance with a regulation, order or statute which it administers. For any such enforcement, MDOT must, through the Attorney General or a local prosecutor, turn to a *judicial proceeding* in a court. (See MICH. COMP. LAWS ANN. §§ 460.302; 460.558; 462.19; 462.26 (a), (c); 462.38; 467.10; 469.9; 469.37; and 469.103.) App. F. pp. F-1-F-6.

In short, MDOT's proceedings, whether called administrative or quasi-judicial, can only go so far. MDOT can act as a factfinder and issue orders but under Michigan's Constitution cannot exercise judicial powers. Its proceedings in this case, contrary to the appellate court holding, were *not* judicial in nature.

Prentis vs. *Atlantic Coastline Co.*, 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908) is quoted by the Court of Appeals in support of its finding of a "judicial proceeding" here. *Prentis* dealt with the Virginia State Corporation Commission which, under Virginia law, was vested with both legislative and judicial powers (*NOPSI*, 109 S. Ct. at 2519).

Prentis presented a problem not existent here. There the Court had to decide whether the commission was exercising its legislative or its judicial powers. Here, MDOT has no judicial powers. The *Prentis* test is unnecessary and inapplicable. Indeed, in *Detroit & Mackinaw Railway* vs. *Michigan Railway Commission*, 235 U.S. at 404-5, Justice Holmes discussed *Prentis* and clearly contrasted Michigan's Constitution with its separation of powers with Virginia's, which affirmatively granted dual powers. In that case, the

Michigan Supreme Court was found to be without legislative powers to fix rates.

Another compelling argument against elevating MDOT's proceeding to the level of "judicial" is found in *American Motors* vs. *Runke*, (CA 6 1983) 708 F. 2d 202, 204, n. 5. While that case involved the Federal Anti-Injunction Act, it discussed the nature of a Kentucky DOT administrative proceeding, finding it essentially an executive function and pointing out . . . "The State is both the adversary and decision maker". Such is the case with MDOT. The essence of a judicial proceeding is a neutral forum. MDOT is an adversary.

Michigan's Constitution and Michigan's Supreme Court say MDOT is without judicial powers. The "judicial proceeding" required to satisfy *Younger* guidelines is absent here.

CONCLUSION AND RELIEF REQUESTED

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 88-1629

CSXT, INC, a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ and NORMA J. FLEMING, in their official capacities; DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN,
Defendants-Appellants (88-1642),

THE UNITED TRANSPORTATION UNION,
Intervening Defendant-Appellant (88-1629).

Before: MERRITT and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated and the case is remanded with instructions to dismiss.

IT IS FURTHER ORDERED that Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN
Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: October 12, 1989

COSTS: APPELLANT TO RECOVER

Filing Fee ..... $
Printing $176.00
Total..... $

APPENDIX B

Nos. 88-1629; 88-1642

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan, and the DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN,
Defendants-Appellants (88-1642),

and

THE UNITED TRANSPORTATION UNION,
Intervening Defendant-Appellant (88-1629).

ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed August 22, 1989

Before: MERRITT and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

MERRITT, Circuit Judge. The defendants, James J. Pitz, Norma J. Fleming and Michigan Department of Transportation, and the intervening defendant, United Transportation Union, appeal on abstention grounds a District Court injunction restraining the Department from enforcing any state administrative action or rule requiring toilets in railroad locomotives. The injunction was issued on grounds that such a Michigan rule would be preempted by the Locomotive

Boiler Inspection Act, 45 U.S.C. §§ 22-43 (1976) and the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976). The District Court held that the preemption doctrine prohibits the state agency from conducting the contemplated proceeding.[1] The central problem raised by the appeal is whether abstention is appropriate in preemption cases. We conclude under the circumstances of this case that abstention is appropriate; and we, therefore, reverse the order of the District Court. *CSXT, Inc. v. Pitz*, 699 F.Supp. 127 (W.D. Mich. 1988).

I.

The facts are not in dispute. The plaintiff, CSXT, is an interstate railroad system operating in Michigan. About one-third of CSXT's locomotives are not equipped with toilets. The defendant, Michigan Department of Transportation, has a general rule requiring that all railroads have "adequate toilet facilities" for the health of their employees. Mich. Adm. Code Rule 460.1473(a).[2]

The intervening defendant-appellant, United Transportation Union, is an international union representing CSXT train crews working in Michigan. After receiving reports that crew members were being asked to work on CSXT locomotives that did not provide toilet facilities, the Union

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[1] The language of the District Court's injunction is as follows:

> In accordance with the accompanying opinion, this Court grants plaintiff's motion for summary judgment, declares that the LBIA and the FRSA each preempts Rule 460.1473(a), insofar as it is construed to require commodes on locomotives operating in Michigan, and enjoins MDOT from so construing and enforcing the rule.

[2] Rule 460.1473(a) provides in pertinent part:

> Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order of the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

filed a complaint with the Michigan Department of Transportation. The complaint charged CSXT with violating the Michigan rule requiring railroads to have "adequate toilet facilities."

The agency scheduled a hearing before an administrative law judge after CSXT had filed a motion to stay the administrative proceedings. CSXT then filed a suit for injunctive and declaratory relief in federal court. After a hearing, the ALJ denied CSXT's motion for stay. She stated that she doubted that the agency had the authority to entertain the constitutional claims but cited Michigan authority holding that although Michigan administrative agencies ordinarily do not entertain constitutional claims, such claims may be raised in court on review of the agency's decision. Joint Appendix at 107. Additionally, the ALJ said that the sanitary regulations at issue were well within the police powers of the state. She refused to hold that the federal statutes relied upon by CSXT were intended "to prohibit state regulation in an area so basic to public health." *Id.* at 108.

The federal District Court granted the Union's motion to intervene on February 4, 1988, and on the same date entered a preliminary injunction restraining the state agency from enforcing its rule and restraining the agency from conducting the scheduled administrative proceedings until the District Court ruled on CSXT's motion for summary judgment. On February 10, 1988, the Union filed a motion to abstain. The District Court did not expressly consider or rule on the Union's abstention motion. The court found the state rule as applied to locomotives to be preempted by federal law and, therefore, without oral argument granted CSXT's summary judgment motion and issued a permanent injunction.

This appeal requires us to answer two questions. First, does the fact that this case raises preemption rather than other types of constitutional issues require us to modify the classic abstention analysis? And second, once the proper

mode of analysis is determined, does it require abstention in this case?

II.

The first question presented is whether the fact that this case is a preemption case, rather than another type of federal question case, should alter the way in which we view the abstention question. We conclude that it should not.

Two federal statutes are claimed to preempt the Michigan regulation. The Federal Boiler Inspection Act, 45 U.S.C. §§ 22-43 (1976), first adopted in 1911, lists certain equipment required for locomotives and railroad cars. Enforcement of the act is by civil penalty ("not less than $250 and not more than $2500") assessed by the Secretary of Transporation, which may be collected by suit in federal court. *Id.* at § 34. The Act does not prohibit concurrent state regulation or purport to occupy the field of railroad negotiation. The Railroad Safety Act, 45 U.S.C. §§ 421-44 (1976), adopted in 1970, is broader. It allows the Secretary to "prescribe . . . appropriate rules . . . for all areas of railroad safety," including rules concerning equipment and operating procedures. *Id.* at § 431(a). The Act allows limited concurrent state regulation.[3] The Act also provides for a similar but more elaborate system of enforcement through the

[3] The Act states:

> The Congress declares that laws . . . relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law . . . relating to railroad safety *until such time as the Secretary has adopted a rule . . . covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law . . . relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law . . . and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (1976)(emphasis added).

assessment and collection of civil penalties. *Id.* at § 436. The Secretary has not prescribed rules directly governing locomotive toilets, but CSXT argues that the Secretary has adopted general rules "covering the subject matter" and, therefore, has preempted Michigan law.

The Supreme Court in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, ____ U.S. ____, 109 S.Ct. 2506 (1989) (holding federal abstention not appropriate in favor of state administrative proceedings which are legislative in character), *reversing* 798 F.2d 858 (5th Cir. 1986), has recently rejected the argument that the presence of a preemption question bars a court from applying *Younger* abstention. The Court rejected NOPSI's contention that a district court presented with a preemption-based request for equitable relief was *a priori* divested of its power to abstain.[4]

The recent ruling in *NOPSI* casts doubt on the holding of the Eighth Circuit in *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985). There the Eighth Circuit declined to abstain in a nuclear power case in which it found that the Arkansas Public Service Commission was interfering with the jurisdiction of the Federal Energy Regulatory Commission. The state agency threatened to hold illegal certain purchase contracts between a large, multi-state, electric utility and its Arkansas subsidiary. The Arkansas agency apparently wanted to deter the state subsidiary from taking nuclear power from the parent, and the court suggested that such a state decision would have a serious effect on the parent's construction of

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[4] [O]ne of the issues in the present case is whether the principle of *Younger* can properly be extended to this type of suit. NOPSI argues that *Younger* does not require abstention in the face of a substantial claim that the challenged state action is completely pre-empted by federal law.... We disagree.

NOPSI, 109 S.Ct. at 2516.

a multi-billion dollar nuclear power plant. The basis of the Court's abstention ruling is not entirely clear, but it appears that the Court declined to abstain because it considered *federal regulatory jurisdiction* over the power contracts in question to be exclusively vested in the federal power agency. The Eighth Circuit did not discuss whether it considered the *federal court's jurisdiction* over the preemption issue to be exclusive or concurrent with the state court's.

The abstention issue in preemption cases should not turn on a determination concerning the location of exclusive regulatory jurisdiction in a federal or state agency. The state-federal regulatory jurisdictional issue usually turns, in one form or another, on whether the activity in question is characterized as intrastate or interstate. *See, e.g.*, Federal Power Act, 16 U.S.C. § 824(b)(1)(1976)(distinction stated as "transmission of electrical energy in interstate commerce" or "the sale of electrical energy at wholesale" versus "local distribution" or "the transmission of eletrical energy in intrastate commerce"). Under such statutes, the regulatory jurisdiction is exclusively state if the activity is intrastate, and exclusively federal if interstate. Such determinations of regulatory jurisdiction are often highly fact-specific and address themselves in the first instance to the expertise of the administrative agencies charged with economic regulation of the particular industry. In such cases both Congress and the state legislature have delegated frontline authority to find facts and devise economic regulations to administrative bodies with specialized knowledge of the industries to be regulated. Ordinarily, it is not prudent for courts to interfere in the regulatory process before the facts are sorted out and the regulatory rule is defined and applied.

In the present case there is no grant of exclusive jurisdiction to federal courts to resolve federal railroad safety questions or preemption claims in this area of the law. State courts do not lack jurisdiction over railroad safety issues or preemption claims. State courts normally have concurrent

jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79 (1981); *Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1282-86 (6th Cir. 1988).

Other policies support our holding that abstention cases involving preemption should not be treated differently than other abstention cases. We reject the oft-repeated assertion that the federal courts have "unique expertise" in adjudicating preemption claims because they are "comparatively more skilled at interpreting and applying federal law and are much more likely to correctly ascertain congressional intent." Note, *The Preemption Dimension of Abstention*, 89 Colum.L.Rev. 310, 322-23 (1989). State judges are not inferior to federal judges. They have the ability to interpret federal statutes, however complex. Though preemption is a constitutional issue, it is not of a differrent order of magnitude than due process, first amendment and other constitutional issues which often arise during the course of a state or federal administrative and judicial proceeding. To hold that a state court may decide federal constitutional issues generally but should not decide preemption issues makes little sense.

State courts frequently decide such issues. It may be argued that state judges are somewhat more inclined to read state regulatory jurisdiction more broadly than federal judges. Compare *Michigan Gas Storage Co. v. Michigan Public Service Comm'n*, 405 Mich. 376, 275 N.W.2d 457 (1979), in which the Michigan Supreme Court, after extensive analysis of the federal Natural Gas Act, concluded that the Act does not preempt state regulation of the securities of gas companies, with *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986), *aff'd*, 108 S. Ct. 1145 (1988), reaching the opposite result. But see *Natural Gas Pipeline Co. v. Illinois Commerce Comm'n*, 33 Ill.2d 214, 210 N.E.2d 490 (1965), in which the Illinois Supreme Court held Illinois regulation of natural gas securities preempted by the Natural

Gas Act. Even if it were true that state judges were less inclined to displace state regulatory jurisdiction than federal judges, this tendency is not a sufficient reason to modify the doctrine of abstention by substituting federal for state judges in cases raising preemption issues.

The Tennessee Court of Appeals recently decided a preemption issue under the Federal Railroad Safety Act similar to the one raised in the present case. The issue was whether the federal Act preempts state administrative proceedings enforcing a requirement concerning the construction of "walkways" in railroad switching yards. Judge Cantrell, after extensive analysis of the issue, concluded that Tennessee's walkways rule was not covered by a federal rule on the same subject matter and, therefore, was not preempted. *Illinois Central Gulf Ry. Co. v. Tennessee Public Service Comm'n*, 736 S.W.2d 112, 115 (Tenn.App. 1987).

In fact, state courts are often in a better position to decide preemption issues because they would do so on review of an administrative decision finding the facts. The threshold determination of whether jurisdiction over an activity is exclusively federal or state or is concurrent is often highly fact-specific and often requires the specialized knowledge of the state administrative agency to which regulation of the activity has been delegated.

Moreover, even if we accepted the proposition that some state courts lacked the necessary expertise, the resulting harm—that a case could be decided incorrectly by a state court and be denied certiorari by the United States Supreme Court so that federal-court review of the incorrectly decided constitutional claim was precluded—is no greater than it is when a federal court incorrectly decides a case, and the United States Supreme Court declines review. If the federal decision to abstain and the state decision to assert jurisdiction were inappropriate, it may be that the doctrine of res judicata should not apply in full force to the state court

judgment. *See Key v. Wise*, 454 U.S. 1103 (1981)(Brennan, J., dissenting from denial of *certiorari*).

In summary, we do not see any reason to analyze abstention cases involving a preemption claim differently than other abstention cases. In particular, we do not agree that the decisive abstention question in preemption cases arising from pending state administrative proceedings is whether the *regulatory authority* over the particular activity in question is exclusively federal or exclusively state. A federal court need ask itself only two questions: whether the state court has concurrent judicial jurisdiction to decide the preemption question, and, if the answer to that question is "Yes," whether a federal court should abstain in favor of ongoing state proceedings originating in the state regulatory agency. There is no question in the present case that concurrent *judicial* jurisdiction exists. We, therefore, proceed to inquire whether abstention is appropriate.

III.

Abstention pursuant to the judicially-crafted rule announced in *Younger v. Harris*, 401 U.S. 37 (1971), is appropriate only where a court can answer all three of the following questions in the affirmative:

> [F]irst, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). In the present case we answer affirmatively all three questions.

Is the administrative proceeding here an "ongoing state judicial proceeding?" *Middlesex*, 457 U.S. at 432. Under the Supreme Court's recent analysis is *NOPSI*, it clearly is. There the Court explained that an agency's proceeding will

be characterized as judicial or legislative depending on the "nature of the final act" which it is designed to produce. *NOPSI*, 109 S.Ct. at 2519 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908)(Holmes, J.)). Where the proceeding "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," it is judicial. *Id.* at 2520 (quoting *Prentis*, 211 U.S. at 226). We are faced with an administrative proceeding before the Michigan Department of Transportation in which the interpretation and application of a state rule requiring "adequate toilet facilities" are in question and in which the final result will be a determination whether CSXT is liable for a violation of this established rule. There is, thus, an ongoing state proceeding that is judicial in nature, and we must acknowledge that it implicates all the comity concerns that motivate the *Younger* doctrine.

The third requirement—of an "adequate opportunity" to raise the issue—is also met, even though the state administrative agency may have no power to hear CSXT's constitutional claim, because Michigan law supplies full judicial review of this agency proceeding. The Michigan Administrative Procedures Act, Mich. Comp. Laws § 24.301, provides for review of such proceedings, and the Michigan courts will entertain the federal question on review. *See Michigan Gas Storage Co., supra* (reviewing preemption issues); *Blue Cross and Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 300 (6th Cir. 1984).

Our analysis of this question has been decisively settled by decisions of the Supreme Court and this Court. In *Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988), our Court traced the development of the doctrine of abstention as it applies to pending state administrative proceedings. In *Watts*, a doctor faced a license suspension proceeding before the Tennessee Board of Medical Examiners, a proceeding in which his federal constitutional claims could first be adjudi-

cated only by a state court in review of the decision of the Board. Judge Contie, writing for our Court, concluded that Supreme Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), governs the question:

> Watts contends that he will not be permitted to assert his constitutional claims in the administrative proceedings before the Board. This contention is supported by the record, which shows that after Watts asserts his constitutional claims as affirmative defenses to the Division's motion to summarily suspend his license, the Division successfully brought a motion to strike those defenses on the ground that they were not within the scope of review of proceedings before the Board of Medical Examiners. This fact alone does not, however, establish that Watts will be deprived of an opportunity to present his constitutional claims. In *Dayton Christian Schools*, the Supreme Court stated that "it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding."

Watts, 854 F.2d at 848. The Full quotation from the *Dayton Christian Schools* case is as follows:

> In any event, it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding. Section 4112.06 of Ohio Rev. Code Ann. (1980) provides that any "respondent claiming to be aggrieved by a final order of the commission . . . may obtain judicial review thereof." Dayton cites us to no Ohio authority indicating that this provision does not authorize judicial review of claims that agency action violates the United States Constitution.

477 U.S. at 619.

Finally, we do not agree that the state proceedings which CSXT seeks to have enjoined do not implicate vital state interests. The unsanitary disposal of human waste creates a risk of pollution and disease: preventing such risks is one of

the preeminent functions of the state's police power to protect the health and safety of its residents. A finding of preemption will bar the enforcement of a state law, but it is not a finding that the state has no important interest. Rather it is finding that the federal interest is more important or more vital than the state interest, so that the supremacy clause requires that the federal interest prevail.

The case before us thus involves an ongoing state administrative proceeding that is judicial in nature; it involves a state administrative proceeding from which CSXT may appeal to Michigan state courts to obtain a ruling on its constitutional claim, and it arises in an area in which Michigan has a vital state interest. Every element of abstention is present.

IV.

For all the foregoing reasons, we conclude that the District Court should have abstained. Our holding should not be read as applying a hard and fast rule of abstention in all state administrative matters involving preemption, for as Professor Shapiro has aptly warned:

> The complexity of our federal system—the tension between notions of separateness and interdependence, between the existence and the limits of federal supremacy—makes it impossible to frame a simple rule that will resolve every case. Sometimes these tensions cut in favor of federal action. At other times, they counsel reluctance to pull apart federal and state issues that are not easily separated; to disrupt ongoing state proceedings unless the very prosecution of those proceedings, regardless of their outcome, threatens impairment of federal rights; to take over the management of state institutions; or to assume the inability of state courts to recognize and enforce federal rights.

Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 583 (1985). We find no considerations in this case, however, which would counsel the federal courts to interfere with the ongoing railroad safety proceeding in the Michigan Department of Transportation. Accordingly, the judgment of the District Court is vacated and the case remanded with instructions to dismiss.

APPENDIX C

C-1

No. 88-1629

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, *et al.*,
Defendants,

UNITED TRANSPORTATION UNION,
Defendant-Appellant

ORDER

Before: MERRITT, Chief Judge, BOGGS, Circuit Judge, and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

APPENDIX D

CXST, INC., a Virginia
Corporation, Plaintiff,

v.

James J. PITZ, Director of the Department of Transportation of the State of Michigan, Norma J. Fleming, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan, and the Department of Transportation of the State of Michigan, Defendants,

and

The United Transportation Union,
Intervening Defendant.

No. L 88-17 CA 5.

United States District Court,
W.D. Michigan, S.D.

May 13, 1988.

Railway company operating in both Canada and United States sought declaratory judgment that state rule requiring locomotives operating within state to have commodes in them was preempted by federal law. The District Court, Robert Holmes Bell, J., held that both Federal Railroad Safety Act and Locomotive Boiler Inspection Act completely preempted state regulations dealing with locomotives, its boiler, tender, and all parts and appurtenances including state regulation requiring locomotives to have commodes.

Judgment for plaintiff.

Employers' Liability Key 46
States Key 18.45

Both Federal Railroad Safety Act and Locomotive Boiler Inspection Act completely preempted state regulation dealing with a locomotive, its boiler, tender, and all parts and appurtenances thereof, including state regulation requiring locomotives to have commodes; state regulation was within subject matter already contained within federal regulations. Boiler Inspection Act, 45 U.S.C.A § 22 et seq.; Federal Railroad Safety Act of 1970, § 101 et seq., 45 U.S.C.A. § 421 et seq.; U.S.C.A. Const. Art. 6, cl. 2

Patrick E. Hackett, Carol Hackett-Garagiola, Bloomfield Hills, Mich., Sally J. Kircher, Jacksonville, Fla., for plaintiff.

Frank J. Kelley, Atty. Gen., State of Mich. by Susan Peck Iannotti, William Reid Ralls, Lansing, Mich., for defendants.

OPINION

ROBERT HOLMES BELL, District Judge.

Before this Court is plaintiff's motion for summary judgment on its complaint. In its complaint plaintiff seeks a judgment declaring that the Michigan Department of Transportation (MDOT) Rule 460.1473(a) is preempted by the Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.* and an injunction prohibiting defendant MDOT from enforcing Rule 460.1473(a) against CSXT.

BACKGROUND

CSXT is a railway company operating in Canada and twenty states including Michigan. United Transportation Union (UTU), intervening defendant, represents railroad workers and complained to MDOT that CSXT violated Rule

460.1473(a) by failing to provide commodes on locomotives operating in Michigan. MDOT scheduled a hearing on the complaint before an administrative law judge for February 10, 1988. On January 23, 1988, CSXT filed this lawsuit for declaratory and injunctive relief. On January 27, 1988, an MDOT administrative law judge denied CSXT's motion to stay state administrative proceedings pending this Court's determination of CSXT's claims that Rule 460.1473(a) was preempted. On February 8, 1988, this Court granted CSXT's motion for a preliminary injunction restraining defendants from enforcing Rule 460.1473(a) until August 4, 1988, or until this Court's ruling on CSXT's motion for summary judgment.

Of CSXT's 3,000 locomotives approximately 1,000 do not have commodes. Some unequipped locomotives operate in Michigan. However, CSXT indicates that it plans to equip all of its locomotives with commodes within three years.

The disputed rule textually requires "adequate toilet facilities," but does not specifically require equipping each locomotive with an individual commode. Nevertheless, MDOT has argued its position assuming that enforcement of Rule 460.1473(a) would require equipping locomotives with commodes. The administrative law judge's analysis presumes the same. Although UTU does not concur with MDOT that the rule requires a commode on every locomotive, for purposes of its preemption analysis this Court assumes that application of the rule would require installation of a commode on each CSXT locomotive operating in Michigan. Rule 460.1473(a) provides:

> Running Facilities
> Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in reasonably clean and sanitary condition.

ANALYSIS

The issue before this Court is whether Rule 460.1473(a) is preempted by the Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.*

The doctrine of preemption is based upon the supremacy clause of the Constitution, art. VI, cl. 2, which mandates that federal law overrides any conflicting state regulation. Moreover, when exercising one of its plenary powers, Congress can occupy an entire regulable field with federal law and effectively prohibit any parallel state legislation. *Missouri-Pacific Railroad Company v. Porter*, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672 (1927). Congress can clearly manifest its intention to preempt state law by explicitly stating its intent to totally occupy a field. Or in lieu of any clear manifestation courts will discern the clarity of Congress' intent to preempt state regulation by the pervasiveness of the federal regulatory scheme, the need for national uniformity, or the potential for conflict between administering federal and state programs. *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956).

Locomotive Boiler Inspection Act

CSXT argues that the LBIA preempts Rule 460.1473(a) because in the LBIA Congress intended to occupy the entire field of locomotive equipment regulation as determined by the Supreme Court in *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926). Defendants and amicus respond that *Napier* is no longer good law because the FRSA has impliedly superseded the LBIA.

The LBIA, 45 U.S.C. § 23, provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive,

its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may prescribed in the rules and regulations hereinafter provided for.

In *Napier* the Court held that LBIA preempted a Georgia state statute requiring automatic doors on locomotive fireboxes and a Wisconsin statute requiring locomotive cab curtains. The Court recognized that the LBIA comprehensively empowered the Interstate Commerce Commission [authority now resident with the Secretary of Transportation and the Federal Railroad Administration, 49 U.S.C.App. §§ 103 and 1655(e)(1)(E)] to promulgate regulations regarding material, construction, and design of locomotives and all their appurtenances in order to enforce compliance with the LBIA. *Napier*, at 609, 47 S.Ct. at 208. The Court also noted that no federal regulation existed as to the specific items, fire-box doors and cab curtains, that the state regulation required. However, the Court determined that Congress intended the LBIA to occupy the entire field of locomotive equipment and consequently the LBIA preempted the state legislation, *Napier*, at 612-613, 47 S.Ct. at 209-10.

Even though *Napier* was decided in 1926, contemporary federal courts continue to accept it as binding precedent recognizing that Congress intended that the LBIA would occupy totally the field of locomotive equipment and preempt any state regulation of it. Further, this Court is unaware of any federal court authority overruling *Napier*. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), *Missouri Pacific Railroad Co. v. Railroad Commis-*

sion of Texas, 833 F.2d 570 (5th Cir.1987), *Consolidated Rail Corp. v. Pennsylvania Public Utility*, 536 F.Supp. 653 (E.D.Pa.1982), *aff'd mem.*, 696 F.2d 981 (3rd Cir.1982), *aff'd mem.*, 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983). Moreover, the various authorities proffered by defendants are neither binding precedent on this Court nor reasonably persuasive.

This Court is similarly convinced that in the LBIA Congress clearly manifested its intent to fully occupy the field of locomotive equipment regulation by employing language providing for "rules and regulations" covering a "locomotive, its boiler, tender, and all parts and appurtenances thereof."

Defendants contend that the FRSA, passed subsequently to the LBIA, indicates an unambiguous change in Congress' alleged intent to occupy the field of locomotive equipment regulation. Defendants refer to the legislative history of the FRSA identifying its primary purpose to "promote safety in all areas of railroad operations" and calling "for broadscale Federal legislation with provisions for active State participation to assure a much higher degree of railroad safety in the years ahead." H.R.Rep. No. 1194, 91st Cong., 2d Sess. 19-20 (1970), *reprinted in* 1970 U.S.Code Cong. & Admin.News 4104-4105. (Report 1194, with cites to USSCAN).

CSXT, however, notes that Report 1194, at 4113-4114, underscores the continuing effect of existing federal railroad safety law when commenting on § 202 of the FRSA:

> The committee added the words "supplementing provisions of law and regulations in effect on the date of enactment of this title" to the Secretary's rulemaking authority to make clear that this grant of jurisdiction does not replace the existing rail safety statutes and implementing regulations transferred to the Department of Transportation. . . . It is the committee's intent that those existing statutes will continue to be enforced and administered by the Department in their respective area and that

> the new authority will be implemented with respect to those areas of rail safety not now subject to Federal jurisdiction. In other words, it is the intent of the committee that the existing statutes continue to be administered and enforced as if this legislation had not been enacted.

Since the LBIA was in effect on the date of the FRSA's enactment, this legislative history indicates that Congress did not intend that the FRSA would supersede the LBIA.

This Court acknowledges that in the LBIA Congress intended to occupy the field of locomotive equipment regulation, as recognized in *Napier*, and determines that the FRSA did not impliedly modify the LBIA. Consequently, this Court determines that the LBIA preempts Rule 460.1473(a) insofar as it may be construed to require commodes on locomotives operating in Michigan.

Federal Railroad Safety Act

CSXT claims that the FRSA preempts Rule 460.1473(a) because the rule attempts to regulate the same subject matter as the FRSA, does not qualify under the FRSA's provision for limited state regulation. Defendants and amicus argue that the FRSA specifically provides for state regulation such as Rule 460.1472(a).

The FRSA, § 205, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not

incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

This Court recognizes that Congress prefaces this section with its policy declaration that railroad safety laws "shall be nationally uniform to the extent practicable." This Court further notes that Congress provides for individual state regulations relating to railroad safety until a federal regulation is promulgated covering the "subject matter" of the state regulation. CSXT asserts that "subject matter" should be construed as regulable categories, such as, locomotive equipment. Defendants and amicus maintain that "subject matter" should be narrowly construed to mean particular and specific items, such as, sanitary facilities on locomotives. The pivotal issue is the scope of the phrase "subject matter."

This Court acknowledges Congress' explicit statement that railroad safety laws should be as nationally uniform as practicable. This reasonably suggests that the "subject matter" under state regulation should be circumscribed and distinct from the "subject matter" under federal regulation. Nevertheless, Congress does provide for additional or more stringent state regulation of a federally regulated "subject matter" in order to eliminate or reduce an "essentially local safety hazard." But that is not the present case as the parties themselves recognize.

Congress' mandate of national uniformity also logically implies a broad construction of the term "subject matter" as a category, class, or group, rather than a specific, particular, or individual item. If "subject matter" were construed narrowly as item specific, then states would be free to interstitially impose a myriad of gap filling safety regulations in areas where Congress may have regulated comprehensively, although not exhaustively. This approach would promote piecemeal, ad hoc, and fragmentary regulation, and, thereby, effectively destroy national uniformity.

This Court acknowledges and endorses the rationale of *Norfolk and Western Ry. Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich. 1984). In *Burns* the court determined that the FRSA preempted state regulation of railroad walkways because walkways comprised an unspecified part of the general track structure, which was a federally regulated "subject matter." The *Burns* court recognized the potential "subject matter" conflict arising from Congress' intent to provide uniform railway safety regulations and the states' limited right to regulate for safety:

> To the degree that this pronouncement suggests federal preemption, it is equally important to note that the matter of permissible state regulation is specifically addressed. First, it is clear that there can be no preemption unless the Secretary has actually adopted a railroad safety standard. *That does not necessarily mean that the standard adopted must detail every conceivable item that might be contemplated thereby;* but, at least, there has to be some action generally indicating that the Secretary is acting pursuant to the powers vested in him by Congress. (emphasis added)

Burns, at 164.

In the instant case, federal regulations exist comprehensively governing locomotive design and equipment. Railroad locomotive safety standards are extensively specified in 49 C.F.R. §§ 229.1-229.141 (1987) detailing numerous individual items of locomotive equipment. This Court recognizes the expansive range and comprehensive scope of these safety standards for locomotive design and equipment. This Court also acknowledges that locomotive commodes do not appear as specific regulated items. Nevertheless, this Court determines that the phrase, "subject matter," is most reasonably construed broadly as a category, group, or class because of the comprehensive scope and character of existing federal locomotive safety regulations. Even though these comprehensive federal regulations do not exhaustively "detail every

conceivable item that might be contemplated," they, in fact, define a category of "subject matter" by their scope and range of which this Court determines that locomotive commodes are part and parcel. Therefore, the existing comprehensive federal regulation of locomotive equipment, which this Court recognizes as constituting a category, class, group, or field of "subject matter" under the FRSA, § 205, preempts state regulation requiring locomotive commodes.

CONCLUSION

Accordingly, this Court determines that the LBIA and the FRSA each preempt Rule 460.1473(a) insofar as it is construed to require commodes on locomotives operating in Michigan.

APPENDIX E

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APPENDIX C—FRA LOCOMOTIVE STANDARDS DEFECT CODE [NOTE]

AUTHORITY: Secs. 1, 2, 5, 9, 36 Stat. 913, 914 (45 U.S.C. 22, 23, 28, 34); sec. 6(e) and (f), 80 Stat. 939, 940 (49 U.S.C. 1655(e) and (f)).

SOURCE: 45 FR 21109, Mar. 31, 1980, unless otherwise noted.

Subpart A—General

§ 229.1 Scope.

This part prescribes minimum Federal safety standards for all locomotives except those propelled by steam power.

§ 229.3 Applicability.

This part applies to all common carriers by railroad as defined in the Locomotive Inspection Act (45 U.S.C. 22).

§ 229.4 Information collection.

(a) The information collection requirements in this part have been reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511, and have been assigned OMB control number 2130-0004.

(b) The information collection requirements are found in the following sections:

(1) Section 229.9

(2) Section 229.17

(3) Section 229.21

(4) Section 229.23

(5) Section 229.27

(6) Section 229.29

(7) Section 229.31

(8) Section 229.33

(9) Section 229.55

(10) Section 229.103

(11) Section 229.105

(12) Section 229.113

[50 FR 6953, Feb. 19, 1985]

§ 229.5 Definitions.

As used in this part—

(a) "Break" means a fracture resulting in complete separation into parts.

(b) "Cab" means that portion of the superstructure designed to be occupied by the crew operating the locomotive.

(c) "Carrier" means a common carrier by railroad subject to the Locomotive Inspection Act (45 U.S.C. 22).

(d) "Control cab locomotive" means a locomotive without propelling motors but with one or more control stands.

(e) "Crack" means a fracture without complete separation into parts, except that castings with shrinkage cracks or hot

tears that do not significantly diminish the strength of the member are not considered to be cracked.

(f) "Dead locomotive" means—

(1) A locomotive other than a control cab locomotive that does not have any traction device supplying tractive power; or

(2) A control cab locomotive that has a locked and unoccupied cab.

(g) "High voltage" means an electrical potential of more than 150 volts.

(h) "Lite locomotive" means a locomotive or a consist of locomotives not attached to any piece of equipment or attached only to a caboose.

(i) "Locomotive" means a piece of on-track equipment other than hi-rail, specialized maintenance, or other similar equipment—

(1) With one or more propelling motors designed for moving other equipment;

(2) With one or more propelling motors designed to carry freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

(j) "MU locomotive" means a multiple operated electric locomotive described in paragraph (i)(2) or (3) of this section.

(k) "Powered axle" is an axle equipped with a traction device.

(l) "Serious injury" means an injury that results in the amputation of any appendage, the loss of sight in an eye, the fracture of a bone, or the confinement in a hospital for a period of more than 24 consecutive hours.

§ 229.7 Prohibited acts.

(a) The Locomotive Inspection Act (45 U.S.C. 22-34) makes it unlawful for any carrier to use or permit to be used on its line any locomotive unless the entire locomotive and its appurtenances—

(1) Are in proper condition and safe to operate in the service to which they are put, without unnecessary peril to life or limb; and

(2) Have been inspected and tested as required by this part.

(b) A carrier is subject to a penalty, as provided in Appendix B, if it fails to comply with any provision of this part or of the Locomotive Inspection Act.

§ 229.9 Movement of non-complying locomotives.

(a) Except as provided in paragraphs (b) and (c), a locomotive with one or more conditions not in compliance with this part may be moved only as a lite locomotive or a dead locomotive after the carrier has complied with the following:

(1) A qualified person shall determine—

(i) That it is safe to move the locomotive; and

(ii) The maximum speed and other restrictions necessary for safely conducting the movement;

(2)(i) The engineer in charge of the movement of the locomotive shall be notified in writing and inform all other crew members in the cab of the presence of the non-complying locomotive and the maximum speed and other restrictions determined under paragraph (a)(1)(ii) of this section.

(ii) A copy of the tag described in paragraph (a)(3) of this section may be used to provide the notification required by paragraph (a)(2)(i) of this section.

(3) A tag bearing the words "non-complying locomotive" and containing the following information, shall be securely attached to the control stand on each MU or control cab locomotive and to the isolation switch or near the engine start switch on every other type of locomotive—

(i) The locomotive number;

(ii) The name of the inspecting carrier;

(iii) The inspection location and date;

(iv) The nature of each defect;

(v) Movement restrictions, if any;

(vi) The destination; and

(vii) The signature of the person making the determinations required by this paragraph.

(b) A locomotive that develops a non-complying condition enroute may continue to utilize its propelling motors, if the requirements of paragraph (a) are otherwise fully met, until the earlier of—

(1) The next calendar day inspection, or

(2) The nearest forward point where the repairs necessary to bring it into compliance can be made.

(c) A non-complying locomotive may be moved lite or dead within a yard, at speeds not in excess of 10 miles per hour, without meeting the requirements of paragraph (a) of this section if the movement is solely for the purpose of repair. The carrier is responsible to insure that the movement may be safely made.

(d) A dead locomotive may not continue in use following a calendar day, inspection as a controlling locomotive or at the head of a train or locomotive consist.

(e) A locomotive does not cease to be a locomotive because its propelling motor or motors are inoperative or because its control jumper cables are not connected.

(f) Nothing in this section authorizes the movement of a locomotive subject to a Special Notice for Repair unless the movement is made in accordance with the restrictions contained in the Special Notice.

§ 229.11 Locomotive identification.

(a) The letter "F" shall be legibly shown on each side of every locomotive near the end which for identification purposes will be known as the front end.

(b) The locomotive number shall be displayed in clearly legible numbers on each side of each locomotive.

§ 229.13 Control of locomotives.

Except when a locomotive is moved in accordance with § 229.9, whenever two or more locomotives are coupled in remote or multiple control, the propulsion system, the sanders, and the power brake system of each locomotive shall respond to control from the cab of the controlling locomotive. If a dynamic brake or regenerative brake system is in use, that portion of the system in use shall respond to control from the cab of the controlling locomotive.

§ 229.14 Non-MU control cab locomotives.

On each non-MU control cab locomotive, only those components added to the passenger car that enable it to serve as a lead locomotive, control the locomotive actually providing tractive power, and otherwise control the movement of the train, are subject to this part.

§ 229.17 Accident reports.

(a) In the case of an accident due to a failure from any cause of a locomotive or any part or appurtenance of a locomotive, or person coming in contact with an electrically energized part or appurtenance, that results in serious injury or death of one or more persons, the carrier operating the

locomotive shall immediately report the accident by toll free telephone, Area Code 800-424-0201. The report shall state the nature of the accident, number of persons killed or seriously injured, the place at which it occurred, the location at which the locomotive or the affected parts may be inspected by the FRA, and the name, title and phone number of the person making the call. The locomotive or the part or parts affected by the accident shall be preserved intact by the carrier until after the FRA inspection.

(b) Written confirmation of the oral report required by paragraph (a) of this section shall be immediately mailed to the Federal Railroad Administration, RRS-25, Washington, D.C. 20590, and contain a detailed description of the accident, including to the extent known, the causes and the number of persons killed and injured. The written report required by this paragraph is in addition to the reporting requirements of 49 CFR Part 225.

§ 229.19 Prior waivers.

All waivers of every form and type from any requirement of any order or regulation implementing the Locomotive Inspection Act, applicable to one or more locomotives except those propelled by steam power, shall lapse on August 31, 1980, unless a copy of the grant of waiver is filed prior to that date with the Office of Safety (RRS-23), Federal Railroad Administration, Washington, D.C. 20590.

Subpart B—Inspections and Tests

§ 229.21 Daily inspection.

(a) Except for MU locomotives, each locomotive in use shall be inspected at least once during each calendar day. A written report of the inspection shall be made. This report shall contain the name of the carrier; the initials and number of the locomotive; the place, date and time of the inspection;

a description of the non-complying conditions disclosed by the inspection; and the signature of the employee making the inspection. Except as provided in § 229.9, any conditions that constitute non-compliance with any requirement of this part shall be repaired before the locomotive is used. A notation shall be made on the report indicating the nature of the repairs that have been made. The person making the repairs shall sign the report. The report shall be filed and retained for at least 92 days in the office of the carrier at the terminal at which the locomotive is cared for. A record shall be maintained on each locomotive showing the place, date and time of the previous inspection.

(b) Each MU locomotive in use shall be inspected at least once during each calendar day and a written report of the inspection shall be made. This report may be part of a single master report covering an entire group of MU's. If any non-complying conditions are found, a separate, individual report shall be made containing the name of the carrier; the initials and number of the locomotive; the place, date and time of the inspection; the non-complying conditions found; and the signature of the inspector. Except as provided in § 229.9, any conditions that constitute non-compliance with any requirement of this part shall be repaired before the locomotive is used. A notation shall be made on the report indicating the nature of the repairs that have been made. The person making the repairs shall sign the report. The report shall be filed in the office of the carrier at the place where the inspection is made or at one central location and retained for at least 92 days.

(c) Each carrier shall designate qualified persons to make the inspections required by this section.

[45 FR 21109, Mar. 31, 1980, as amended at 50 FR 6953, Feb. 19, 1985]

§ 229.23 Periodic inspection: General.

(a) Each locomotive and steam generator shall be inspected at each periodic inspection to determine whether it complies

with this part. Except as provided in § 229.9, all non-complying conditions shall be repaired before the locomotive or the steam generator is used. Except as provided in § 229.33, the interval between any two periodic inspections may not exceed 92 days. Periodic inspections shall only be made where adequate facilities are available. At each periodic inspection, a locomotive shall be positioned so that a person may safely inspect the entire underneath portion of the locomotive.

(b) The periodic inspection of the steam generator may be postponed indefinitely if the water suction pipe to the water pump and the leads to the main switch (steam generator switch) are disconnected, and the train line shut-off-valve is wired closed or a blind gasket applied. However, the steam generator shall be so inspected before it is returned to use.

(c) After April 30, 1980, each new locomotive shall receive an initial periodic inspection before it is used. Except as provided in § 229.33, each locomotive in use on or before April 30, 1980, shall receive an initial periodic inspection within 92 days of the last 30-day inspection performed under the prior rules (49 CFR 230.331 and .451). At the initial periodic inspection, the date and place of the last tests performed that are the equivalent of the tests required by §§ 229.27, 229.29, and 229.31 shall be entered on Form FRA F 6180-49A. These dates shall determine when the tests first become due under §§ 229.27, 229.29, and 229.31. Out of use credit may be carried over from Form FRA F 6180-49 and entered on Form FRA F 6180-49A.

(d) Each periodic inspection shall be recorded on Form FRA F 6180-49A. The form shall be signed by the person conducting the inspection and certified by that person's supervisor that the work was done. The form shall be displayed under a transparent cover in a conspicuous place in the cab of each locomotive.

(e) At the first periodic inspection in each calendar year the carrier shall remove from each locomotive Form FRA F 6180-49A covering the previous calendar year. If a locomotive does not receive its first periodic inspection in a calendar year before April 2 because it is out of use, the form shall be promptly replaced. The Form FRA F 6180-49A covering the preceding year for each locomotive, in or out of use, shall be signed by the railroad official responsible for the locomotive and filed as required in § 229.23(f). The date and place of the last periodic inspection and the date and place of the last test performed under §§ 229.27, 229.29, and 229.31 shall be transferred to the replacement Form FRA F 6180-49A.

(f) The mechanical officer of each railroad who is in charge of a locomotive shall maintain in his office a secondary record of the information reported on Form FRA F 6180-49A under this part. The secondary record shall be retained until Form FRA F 6180-49A has been removed from the locomotive and filed in the railroad office of the mechanical officer in charge of the locomotive. If the Form FRA F 6180-49A removed from the locomotive is not clearly legible, the secondary record shall be retained until the Form FRA F 6180-49A for the succeeding year is filed. The Form F 6180-49A removed from a locomotive shall be retained until the Form FRA F 6180-49A for the succeeding year is filed.

[45 FR 21109, Mar. 31, 1980, as amended at 46 FR 39852, June 12, 1980; 50 FR 6953, Feb. 19, 1985]

§ 229.25 Tests: Every periodic inspection.

Each periodic inspection shall include the following:

(a) All gauges used by the engineer for braking the train or locomotive, except load meters used in conjunction with an auxiliary brake system, shall be tested by comparison with a dead-weight tester or a test gauge designed for this purpose.

(b) All electrical devices and visible insulation shall be inspected.

(c) All cable connections between locomotives and jumpers that are designed to carry 600 volts or more shall be thoroughly cleaned, inspected, and tested for continuity.

(d) Each steam generator that is not isolated as prescribed in § 229.23(b) shall be inspected and tested as follows:

(1) All automatic controls, alarms and protective devices shall be inspected and tested.

(2) Steam pressure gauges shall be tested by comparison with a dead-weight tester or a test gauge designed for this purpose. The siphons to the steam gauges shall be removed and their connections examined to determine that they are open.

(3) Safety valves shall be set and tested under steam after the steam pressure gauge is tested.

§ 229.27 Annual tests.

Each locomotive shall be subjected to the tests and inspections included in paragraphs (b) and (c) of this section, and each non-MU locomotive shall also be subjected to the tests and inspections included in paragraph (a) of this section, at intervals that do not exceed 368 calendar days:

(a)(1) The filtering devices or dirt collectors located in the main reservoir supply line to the air brake system shall be cleaned, repaired, or replaced.

(2) Brake cylinder relay valve portions, main reservoir safety valves, brake pipe vent valve portions, feed and reducing valve portions in the air brake system (including related dirt collectors and filters) shall be cleaned, repaired, and tested.

(3) The date and place of the cleaning, repairing, and testing shall be recorded on Form FRA F 6180-49A

and the person performing the work and that person's supervisor shall sign the form. A record of the parts of the air brake system that are cleaned, repaired, and tested shall be kept in the carrier's files or in the cab of the locomotive.

(4) At its option, a carrier may fragment the work required by this paragraph. In that event, a separate air record shall be maintained under a transparent cover in the cab. The air record shall include the locomotive number, a list of the air brake components, and the date and place of the last inspection and test of each component. The signature of the person performing the work and the signature of that person's supervisor shall be included for each component. A duplicate record shall be maintained in the carrier's files.

(b) Load meters shall be tested. Errors of less than five percent do not have to be corrected. The date and place of the test shall be recorded on Form FRA F 6180-49A and the person conducting the test and that person's supervisor shall sign the form.

(c) Each steam generator that is not isolated as prescribed in § 229.23(b), shall be subjected to a hydrostatic pressure at least 25 percent above the working pressure and the visual return water-flow indicator shall be removed and inspected.

EDITORIAL NOTE: For a limited temporary waiver of compliance document affecting § 229.27 (a)(2), see 50 FR 3910, Jan. 29, 1985.

§ 229.29 Biennial tests.

(a) Except for the valves and valve portions on non-MU locomotives that are cleaned, repaired, and tested as prescribed in § 229.27(a), all valves, valve portions, MU locomotive brake cylinders and electric-pneumatic master controllers in the air brake system (including related dirt

collectors and filters) shall be cleaned, repaired, and tested at intervals that do not exceed 736 calendar days. The date and place of the cleaning, repairing, and testing shall be recorded on Form FRA F 6180-49A, and the person performing the work and that person's supervisor shall sign the form. A record of the parts of the air brake system that are cleaned, repaired, and tested shall be kept in the carrier's files or in the cab of the locomotive.

(b) At its option, a carrier may fragment the work required by this section. In that event, a separate air record shall be maintained under a transparent cover in the cab. The air record shall include the locomotive number, a list of the air brake components, and the date and place of the inspection and test of each component. The signature of the person performing the work and the signature of that person's supervisor shall be included for each component. A duplicate record shall be maintained in the carrier's files.

EDITORIAL NOTE: For a limited temporary waiver of compliance document affecting § 229.29(a), see 50 FR 3910, Jan. 29, 1985.

§ 229.31 Main reservoir tests.

(a) Except as provided in paragraph (c) of this section, before it is put in service and at intervals that do not exceed 736 calendar days, each main reservoir other than an aluminum reservoir shall be subjected to a hydrostatic pressure of at least 25 percent more than the maximum working pressure fixed by the chief mechanical officer. The test date, place, and pressure shall be recorded on Form FRA F 6180-49A, and the person performing the test and that person's supervisor shall sign the form.

(b) Except as provided in paragraph (c) of this section, each main reservoir other than an aluminum reservoir shall be hammer tested over its entire surface while the reservoir is empty at intervals that do not exceed 736 calendar days.

The test date and place shall be recorded on Form FRA F 6180-49A, and the person performing the test and that person's supervisor shall sign the form.

(c) Each welded main reservoir originally constructed to withstand at least five times the maximum working pressure fixed by the chief mechanical officer may be drilled over its entire surface with telltale holes that are three-sixteenths of an inch in diameter. The holes shall be spaced not more than 12 inches apart, measured both longitudinally and circumferentially, and drilled from the outer surface to an extreme depth determined by the formula—

$$D = (.6PR/(S-0.6P))$$

where:

D = extreme depth of telltale holes in inches but in no case less than one-sixteenth inch;

P = certified working pressure in pounds per square inch;

S = one-fifth of the minimum specified tensile strength of the material in pounds per square inch; and

R = inside radius of the reservoir in inches.

One row of holes shall be drilled lengthwise of the reservoir on a line intersecting the drain opening. A reservoir so drilled does not have to meet the requirements of paragraphs (a) and (b) of this section, except the requirement for a hydrostatic test before it is placed in use. Whenever any such telltale hole shall have penetrated the interior of any reservoir, the reservoir shall be permanently withdrawn from service. A reservoir now in use may be drilled in lieu of the tests provided for by paragraphs (a) and (b) of this section, but it shall receive a hydrostatic test before it is returned to use.

(d) Each aluminum main reservoir before being placed in use and at intervals that do not exceed 736 calendar days thereafter, shall be—

(1) Cleaned and given a thorough visual inspection of all internal and external surfaces for evidence of defects or deterioration; and

(2) Subjected to a hydrostatic pressure at least twice the maximum working pressure fixed by the chief mechanical officer, but not less than 250 p.s.i. The test date, place, and pressure shall be recorded on Form FRA F 6180-49A, and the person conducting the test and that person's supervisor shall sign the form.

§ 229.33 Out-of-use credit.

When a locomotive is out of use for 30 or more consecutive days or is out of use when it is due for any test or inspection required by §§ 229.23, 229.25, 229.27, 229.29, or 229.31, an out-of-use notation showing the number of out-of-use days shall be made on an inspection line on Form FRA F 6180-49A. A supervisory employee of the carrier who is responsible for the locomotive shall attest to the notation. If the locomotive is out of use for one or more periods of at least 30 consecutive days each, the interval prescribed for any test or inspection under this part may be extended by the number of days in each period the locomotive is out of use since the last test or inspection in question. A movement made in accordance with § 229.9 is not a use for purposes of determining the period of the out-of-use credit.

Subpart C—Safety Requirements

General Requirements

§ 229.41 Protection against personal injury.

Fan openings, exposed gears and pinions, exposed moving parts of mechanisms, pipes carrying hot gases and high-voltage equipment, switches, circuit breakers, contactors, relays, grid resistors, and fuses shall be in non-hazardous locations or equipped with guards to prevent personal injury.

§ 229.43 Exhaust and battery gases.

(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

(b) Battery containers shall be vented and batteries kept from gassing excessively.

§ 229.45 General condition.

All systems and components on a locomotive shall be free of conditions that endanger the safety of the crew, locomotive or train. These conditions include: insecure attachment of components, including third rail shoes or beams, traction motors and motor gear cases, and fuel tanks; fuel, oil, water, steam, and other leaks and accumulations of oil on electrical equipment that create a personal injury hazard; improper functioning of components, including slack adjusters, pantograph operating cylinders, circuit breakers, contactors, relays, switches, and fuses; and cracks, breaks, excessive wear and other structural infirmities of components, including quill drives, axles, gears, pinions, pantograph shoes and horns, third rail beams, traction motor gear cases, and fuel tanks.

Brake System

§ 229.46 Brakes: General.

The carrier shall know before each trip that the locomotive brakes and devices for regulating all pressures, including but not limited to the automatic and independent brake valves, operate as intended and that the water and oil have been drained from the air brake system.

§ 229.47 Emergency brake value.

(a) Except for locomotives with cabs designed for occupancy by only one person, each road locomotive shall be equipped with a brake pipe valve that is accessible to a member of the crew, other than the engineer, from that crew member's position in the cab. On car body type locomotives, a brake pipe valve shall be attached to the wall adjacent to each end exit door. The words "Emergency Brake Valve" shall be legibly stenciled or marked near each brake pipe valve or shall be shown on an adjacent badge plate.

(b) MU and control cab locomotives operated in road service shall be equipped with an emergency brake valve that is accessible to another crew member in the passenger compartment or vestibule. The words "Emergency Brake Valve" shall be legibly stenciled or marked near each valve or shall be shown on an adjacent badge plate.

§ 229.49 Main reservoir system.

(a)(1) The main reservoir system of each locomotive shall be equipped with at least one safety valve that shall prevent an accumulation of pressure of more than 15 pounds per square inch above the maximum working air pressure fixed by the chief mechanical officer of the carrier operating the locomotive.

(2) Except for non-equipped MU locomotives built prior to January 1, 1981, each locomotive that has a pneumatically actuated system of power controls shall be equipped with a separate reservoir of air under pressure to be used for operating those power controls. The reservoir shall be provided with means to automatically prevent the loss of pressure in the event of a failure of main air pressure, have storage capacity for not less than three complete operating cycles of control equipment and be located where it is not exposed to damage.

(b) A governor shall be provided that stops and starts or unloads and loads the air compressor within 5 pounds per square inch above or below the maximum working air pressure fixed by the carrier.

(c) Each compressor governor used in connection with the automatic air brake system shall be adjusted so that the compressor will start when the main reservoir pressure is not less than 15 pounds per square inch above the maximum brake pipe pressure fixed by the carrier and will not stop the compressor until the reservoir pressure has increased at least 10 pounds.

§ 229.51 Aluminum main reservoirs.

(a) Aluminum main reservoirs used on locomotives shall be designed and fabricated as follows:

(1) The heads and shell shall be made of Aluminum Association Alloy No. 5083-0, produced in accordance with American Society of Mechnical Engineers (ASME) Specification SB-209, as defined in the "ASME Boiler and Pressure Vessel Code" (1971 edition), section II, Part B, page 123, with a minimum tensile strength of 40,000 p.s.i. (40 k.s.i.).

(2) Each aluminum main reservoir shall be designed and fabricated in accordance with the "ASME Boiler and Pressure Vessel Code," section VIII, Division I (1971 edition), except as otherwise provided in this part.

(3) An aluminum main reservoir shall be constructed to withstand at least five times its maximum working pressure or 800 p.s.i., whichever is greater.

(4) Each aluminum main reservoir shall have at least two inspection openings to permit complete circumferential visual observation of the interior surface. On reservoirs less than 18 inches in diameter, the size of each inspection opening shall be at least that of 1½-inch threaded iron

pipe, and on reservoirs 18 or more inches in diameter, the size of each opening shall be at least that of 2-inch threaded iron pipe.

(b) The following publications, which contain the industry standards incorporated by reference in paragraph (a) of this section, may be obtained from the publishers and are also on file in the Office of Safety of the Federal Railroad Administration, Washington, D.C. 20590. Sections II and VIII of the "ASME Boiler and Pressure Vessel Code" (1971 edition) are published by the American Society of Mechanical Engineers, United Engineering Center, 345 East 47th Street, New York, New York 10017.

§ 229.53 Brake gauges.

All gauges used by the engineer for braking the train or locomotive shall be located so that they may be conveniently read from the engineer's usual position in the cab. An air gauge may not be more than three pounds per square inch in error.

§ 229.55 Piston travel.

(a) Brake cylinder piston travel shall be sufficient to provide brake shoe clearance when the brakes are released.

(b) When the brakes are applied on a standing locomotive, the brake cylinder piston travel may not exceed 1½ inches less than the total possible piston travel. The total possible piston travel for each locomotive shall be entered on Form FRA F 6180-49A.

(c) The minimum brake cylinder pressure shall be 30 pounds per square inch.

§ 229.57 Foundation brake gear.

A lever, rod, brake beam, hanger, or pin may not be worn through more than 30 percent of its cross-sectional area,

cracked, broken, or missing. All pins shall be secured in place with cotters, split keys, or nuts. Brake shoes shall be fastened with a brake shoe key and aligned in relation to the wheel to prevent localized thermal stress in the edge of the rim or the flange.

§ 229.59 Leakage.

(a) Leakage from the main air reservoir and related piping may not exceed an average of 3 pounds per square inch per minute for 3 minutes after the pressure has been reduced to 60 percent of the maximum pressure.

(b) Brake pipe leakage may not exceed 5 pounds per square inch per minute.

(c) With a full service application at maximum brake pipe pressure and with communication to the brake cylinders closed, the brakes shall remain applied at least 5 minutes.

(d) Leakage from control air reservoir, related piping, and pneumatically operated controls may not exceed an average of 3 pounds per square inch per minute for 3 minutes.

DRAFT SYSTEM

§ 229.61 Draft system.

(a) A coupler may not have any of the following conditions:

(1) A distance between the guard arm and the knuckle nose of more than 5½ inches on standard type couplers (MCB contour 1904) or more than 5 $^{5}/_{16}$ inches on D&E couplers.

(2) A crack or break in the side wall or pin bearing bosses outside of the shaded areas shown in Figure 1 or in the pulling face of the knuckle.

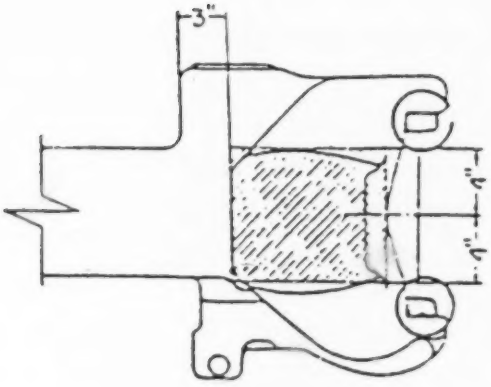


Figure 1

(3) A coupler assembly without anticreep protection.

(4) Free slack in the coupler or drawbar not absorbed by friction devices or draft gears that exceeds one-half inches.

(5) A broken or cracked coupler carrier.

(6) A broken or cracked yoke.

(7) A broken draft gear.

(b) A device shall be provided under the lower end of all drawbar pins and articulated connection pins to prevent the pin from falling out of place in case of breakage.

Suspension System

§ 229.63 Lateral motion.

(a) Except as provided in paragraph (b), the total uncontrolled lateral motion between the hubs of the wheels and boxes, between boxes and pedestals or both, on any pair of wheels may not exceed 1 inch on non-powered axles and friction bearing powered axles, or ¾ inch on all other powered axles.

(b) The total uncontrolled lateral motion may not exceed 1¼ inches on the center axle of three-axle trucks.

§ 229.64 Plain bearings.

A plain bearing box shall contain visible free oil and may not be cracked to the extent that it will leak oil.

§ 229.65 Spring rigging.

(a) Protective construction or safety hangers shall be provided to prevent spring planks, spring seats or bolsters from dropping to track structure in event of a hanger or spring failure.

(b) An elliptical spring may not have its top (long) leaf broken or any other three leaves broken, except when that spring is part of a nest of three or more springs and none of the other springs in the nest has its top leaf or any other three leaves broken. An outer coil spring or saddle may not be broken. An equalizer, hanger, bolt, gib, or pin may not be cracked or broken. A coil spring may not be fully compressed when the locomotive is at rest.

(c) A shock absorber may not be broken or leaking clearly formed droplets of oil or other fluid.

§ 229.67 Trucks.

(a) The male center plate shall extend into the female center plate at least ¾ inch. On trucks constructed to transmit tractive effort through the center plate or center pin, the male center plate shall extend into the female center plate at least 1½ inches. Maximum lost motion in a center plate assemblage may not exceed ½ inch.

(b) Each locomotive shall have a device or securing arrangement to prevent the truck and locomotive body from separating in case of derailment.

(c) A truck may not have a loose tie bar or a cracked or broken center casting, motor suspension lug, equalizer,

hanger, gib or pin. A truck frame may not be broken or have a crack in a stress area that may affect its structural integrity.

§ 229.69 Side bearings.

(a) Friction side bearings with springs designed to carry weight may not have more than 25 percent of the springs in any one nest broken.

(b) Friction side bearings may not be run in contact unless designed to carry weight. Maximum clearance of side bearings may not exceed one-fourth inch on each side or a total of one-half inch on both sides, except where more than two side bearings are used under the same rigid superstructure. The clearance on one pair of side bearings under the same rigid superstructure shall not exceed one-fourth inch on each side or a total of one-half inch on both sides: the other side bearings under the same rigid superstructure may have one-half inch clearance on each side or a total of 1 inch on both sides. These clearances apply where the spread of the side bearings is 50 inches or less; where the spread is greater, the side bearing clearance may only be increased proportionately.

§ 229.71 Clearance above top of rail.

No part or appliance of a locomotive except the wheels, flexible nonmetallic sand pipe extension tips, and trip cock arms may be less than 2½ inches above the top of rail.

§ 229.73 Wheel sets.

(a) The variation in the circumference of wheels on the same axle may not exceed ¼ inch (two tape sizes) when applied or turned.

(b) The maximum variation in the diameter between any two wheel sets in a three-powered-axle truck may not exceed ¾ inch, except that when shims are used at the journal box

springs to compensate for wheel diameter variation, the maximum variation may not exceed 1¼ inch. The maximum variation in the diameter between any two wheel sets on different trucks on a locomotive that has three-powered-axle trucks may not exceed 1¼ inch. The diameter of a wheel set is the average diameter of the two wheels on an axle.

(c) On standard guage locomotives, the distance between the inside gauge of the flanges on non-wide flange wheels may not be less than 53 inches or more than 53½ inches. The distance between the inside gauge of the flanges on wide flange wheels may not be less than 53 inches or more than 53¼ inches.

(d) The distance back to back of flanges of wheels mounted on the same axle shall not vary more than ¼ inch.

§ 229.73 Wheels and tire defects.

Wheels and tires may not have any of the following conditions:

(a) A single flat spot that is 2½ inches or more in length, or two adjoining spots that are each two or more inches in length.

(b) A gouge or chip in the flange that is more than 1½ inches in length and ½ inch in width.

(c) A broken rim, if the tread, measured from the flange at a point five-eighths inch above the tread, is less than 3¾ inches in width.

(d) A shelled-out spot 2½ inches or more in length, or two adjoining spots that are each two or more inches in length.

(e) A seam running lengthwise that is within 3¾ inches of the flange.

(f) A flange worn to a ⅞ inch thickness or less, gauged at a point ⅜ inch above the tread.

(g) A tread worn hollow 5/16 inch or more on a locomotive in road service or 3/8 inch or more on a locomotive in switching service.

(h) A flange height of 1½ inches or more measured from tread to the top of the flange.

(i) Tires less than 1½ inches thick.

(j) Rims less than 1 inch thick on a locomotive in road service or less than ¾ inch on a locomotive in yard service.

(k) A crack or break in the flange, tread, rim, plate, or hub.

(l) A loose wheel or tire.

(m) Fusion welding may not be used on tires or steel wheels of locomotives, except for the repair of flat spots and worn flanges on locomotives used exclusively in yard service. A wheel that has been welded is a welded wheel for the life of the wheel.

Electrical System

§ 229.77 Current collectors.

(a) Pantographs shall be so arranged that they can be operated from the engineer's normal position in the cab. Pantographs that automatically rise when released shall have an automatic locking device to secure them in the down position.

(b) Each pantograph operating on an overhead trolley wire shall have a device for locking and grounding it in the lowest position, that can be applied and released only from a position where the operator has a clear view of the pantograph and roof without mounting the roof.

§ 229.79 Third rail shoes.

When locomotives are equipped with both third rail and overhead collectors, third-rail shoes shall be deenergized

while in yards and at stations when current collection is exclusively from the overhead conductor.

§ 229.81 Emergency pole; shoe insulation.

(a) Each locomotive equipped with a pantograph operating on an overhead trolley wire shall have an emergency pole suitable for operating the pantograph. Unless the entire pole can be safely handled, the part of the pole which can be safely handled shall be marked to so indicate. This pole shall be protected from moisture when not in use.

(b) Each locomotive equipped with third-rail shoes shall have a device for insulating the current collecting apparatus from the third rail.

§ 229.83 Insulation or grounding of metal parts.

All unguarded noncurrent-carrying metal parts subject to becoming charged shall be grounded or thoroughly insulated.

§ 229.85 Doors and cover plates marked "Danger".

All doors and cover plates guarding high voltage equipment shall be marked "Danger—High Voltgage" or with the word "Danger" and the normal voltage carried by the parts so protected.

§ 229.87 Hand-operated switches.

All hand-operated switches carrying currents with a potential of more than 150 volts that may be operated while under load shall be covered and shall be operative from the outside of the cover. Means shall be provided to show whether the switches are open or closed. Switches that should not be operated while under load shall be legibly marked with the words "must not be operated under load" and the voltage carried.

§ 229.89 Jumpers; cable connections.

(a) Jumpers and cable connections between locomotives shall be so located and guarded to provide sufficient vertical clearance. They may not hang with one end free.

(b) Cable and jumper connections between locomotive may not have any of the following conditions:

(1) Broken or badly chafed insulation.

(2) Broken plugs, receptacles or terminals.

(3) Broken or protruding strands of wire.

§ 229.91 Motors and generators.

A motor or a generator may not have any of the following conditions:

(a) Be shorted or grounded.

(b) Throw solder excessively.

(c) Show evidence of coming apart.

(d) Have an overheated support bearing.

(e) Have an excessive accumulation of oil.

INTERNAL COMBUSTION EQUIPMENT

§ 229.93 Safety cut-off device.

The fuel line shall have a safety cut-off device that—

(a) Is located adjacent to the fuel supply tank or in another safe location;

(b) Closes automatically when tripped and can be reset without hazard; and

(c) Can be hand operated from clearly marked locations, one inside the cab and one on each exterior side of the locomotive.

§ 229.95 Venting.

Fuel tank vent pipes may not discharge on the roof nor on or between the rails.

§ 229.97 Grounding fuel tanks.

Fuel tanks and related piping shall be electrically grounded.

§ 229.99 Safety hangers.

Drive shafts shall have safety hangers.

§ 229.101 Engines.

(a) The temperature and pressure alarms, controls and related switches of internal combustion engines shall function properly.

(b) Whenever an engine has been shut down due to mechanical or other problems, a distinctive warning notice giving reason for the shut-down shall be conspicuously attached near the engine starting control until repairs have been made.

(c) Wheel slip/slide protection shall be provided on a locomotive with an engine displaying a warning notice whenever required by § 229.115(b).

STEAM GENERATORS

§ 229.103 Safe working pressure; factor of safety.

The safe working pressure for each steam generator shall be fixed by the chief mechanical officer of the carrier. The minimum factor of safety shall be four. The fixed safe working pressure shall be indicated on FRA Form F 6180-49A.

§ 229.105 Steam generator number.

An identification number shall be marked on the steam generator's separator and that number entered on FRA Form F 6180-49A.

§ 229.107 Pressure gauge.

(a) Each steam generator shall have an illuminated steam gauge that correctly indicates the pressure. The steam pressure gauge shall be graduated to not less than one and one-half times the allowed working pressure of the steam generator.

(b) Each steam pressure gauge on a steam generator shall have a siphon that prevents steam from entering the gauge. The pipe connection shall directly enter the separator and shall be steam tight between the separator and the gauge.

§ 229.109 Safety valves.

Every steam generator shall be equipped with at least two safety valves that have a combined capacity to prevent an accumulation of pressure of more than five pounds per square inch above the allowed working pressure. The safety valves shall be independently connected to the separator and located as closely to the separator as possible without discharging inside of the generator compartment. The ends of the safety valve discharge lines shall be located or protected so that discharged steam does not create a hazard.

§ 229.111 Water-flow indicator.

(a) Steam generators shall be equipped with an illuminated visual return water-flow indicator.

(b) Steam generators shall be equipped with an operable test valve or other means of determining whether the steam generator is filled with water. The fill test valve may not discharge steam or hot water into the steam generator compartment.

§ 229.113 Warning notice.

Whenever any steam generator has been shut down because of defects, a distinctive warning notice giving reasons for the shut-down shall be conspicuously attached near the steam generator starting controls until the necessary repairs have been made. The locomotive in which the steam generator displaying a warning notice is located may continue in service until the next periodic inspection.

Cabs and Cab Equipment

§ 229.115 Slip/slide alarms

(a) Except for MU locomotives, each locomotive used in road service shall be equipped with a device that provides an audible or visual alarm in the cab of either slipping or sliding wheels on powered axles under power. When two or more locomotives are coupled in multiple or remote control, the wheel slip/slide alarm of each locomotive shall be shown in the cab of the controlling locomotive.

(b) Except as provided in § 229.9, an equipped locomotive may not be dispatched in road service, or continue in road service following a daily inspection, unless the wheel slip/slide protective device of whatever type—

(1) Is functioning for each powered axle under power; and

(2) Would function on each powered axle if it were under power.

(c) Effective January 1, 1981, all new locomotives capable of being used in road service shall be equipped with a device that detects wheel slip/slide for each powered axle when it is under power. The device shall produce an audible or visual alarm in the cab.

§ 229.117 Speed indicators.

(a) After December 31, 1980, each locomotive used as a controlling locomotive at speeds in excess of 20 miles per hour shall be equipped with a speed indicator which is—

(1) Accurate within ±3 miles per hour of actual speed at speeds of 10 to 30 miles per hour and accurate within ±5 miles per hour at speeds above 30 miles per hour; and

(2) Clearly readable from the engineer's normal position under all light conditions.

(b) Each speed indicator required shall be tested as soon as possible after departure by means of speed test sections or equivalent procedures.

§ 229.119 Cabs, floors, and passageways.

(a) Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device.

(b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, Safety Glazing Standards, 49 CFR Part 223, 44 FR 77348, Dec. 31, 1979.)

(c) Floors of cabs, passageways, and compartments shall be kept free from oil, water, waste or any obstruction that creates a slipping, tripping or fire hazard. Floors shall be properly treated to provide secure footing.

(d) The cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 50 degrees Fahrenheit 6 inches above the center of each seat in the cab.

(e) Similar locomotives with open end platforms coupled in multiple control and used in road service shall have a means of safe passage between them; no passageway is

required through the nose of car body locomotives. There shall be a continuous barrier across the full width of the end of a locomotive or a continuous barrier between locomotives.

(f) Containers shall be provided for carrying fusees and torpedoes. A single container may be used if it has a partition to separate fusees from torpedoes. Torpedoes shall be kept in a closed metal container.

§ 229.121 Locomotive cab noise.

(a) After August 31, 1980, the permissible exposure to a continuous noise in a locomotive cab shall not exceed an eight-hour time-weighted average of 90dB(A), with a doubling rate of 5dB(A) as indicated in the table. Continuous noise is any sound with a rise time of more than 35 milliseconds to peak intensity and a duration of more than 500 milliseconds to the time when the level is 20dB below the peak.

Duration permitted (hours)	Sound level (dB(A))
12	87
8	90
6	92
4	95
2	100
1½	102
1	105
½	110
¼ or less	115

(b) When the continuous noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect shall be considered. Exposure to different levels for various periods of time shall be computed according to the following formula:

$$D = T_1/L_1 + T_2/L_2 + \ldots . T_2/L_2$$

Where:

D = noise dose.

T = the duration of exposure (in hours) at a given continuous noise level.

L = the limit (in hours) for the level present during the time T (from the table).

If the value of D exceeds 1, the exposure exceeds permissible levels.

(c) Exposure to continuous noise shall not exceed 115dB(A).

(d) Noise measurements shall be made under typical operating conditions using a sound level meter conforming, at a minimum, to the requirements of ANSI S1.4-1971, Type 2, and set to an A-weighted slow response or with an audiodosimeter of equivalent accuracy and precision.

(e) In conducting sound level measurements with a sound level meter, the microphone shall be oriented vertically and positioned approximately 15 centimeters from and on axis with the crew member's ear. Measurements with an audiodosimeter shall be conducted in accordance with manufacturer's procedures as to microphone placement and orientation.

§ 229.123 Pilots, snowplows, end plates.

After January 1, 1981, each lead locomotive shall be equipped with an end plate that extends across both rails, a pilot, or a snowplow. The minimum clearance above the rail of the pilot, snowplow or end plate shall be 3 inches, and the maximum clearance 6 inches.

§ 229.125 Headlights.

(a) Each lead locomotive used in road service shall have a headlight that produces at least 200,000 candela. If a

locomotive or locomotive consist in road service is regularly required to run backward for any portion of its trip other than to pick up a detached portion of its train or to make terminal movements, it shall also have on its rear a headlight that produces at least 200,000 candela. Each headlight shall be arranged to illuminate a person at least 800 feet ahead and in front of the headlight.

(b) Each locomotive or locomotive consist used in yard service shall have two headlights, one located on the front of the locomotive or locomotive consist and one on its rear. Each headlight shall produce at least 60,000 candela and shall be arranged to illuminate a person at least 300 feet ahead and in front of the headlight.

(c) Headlights shall be provided with a device to dim the light.

§ 229.127 Cab lights.

(a) Each locomotive shall have cab lights which will provide sufficient illumination for the control instruments, meters, and gauges to enable the engine crew to make accurate readings from their normal positions in the cab. These lights shall be located, constructed, and maintained so that light shines only on those parts requiring illumination and does not interfere with the crew's vision of the track and signals. Each controlling locomotive shall also have a conveniently located light that can be readily turned on and off by the persons operating the locomotive and that provides sufficient illumination for them to read train orders and timetables.

(b) Cab passageways and compartments shall have adequate illumination.

§ 229.129 Audible warning device.

(a) After August 31, 1980, each lead locomotive shall be provided with an audible warning device that produces a

minimum sound level of 96db(A) at 100 feet forward of the locomotive in its direction of travel. The device shall be arranged so that it can be conveniently operated from the engineer's normal position in the cab.

(b) Measurement of the sound level shall be made using a sound level meter conforming, at a minimum, to the requirements of ANSI S1.4-1971, Type 2, and set to an A-weighted slow response. While the locomotive is on level tangent track, the microphone shall be positioned 4 feet above the ground at the center line of the track, and shall be oriented with respect to the sound source in accordance with the manufacturer's recommendations.

(c) A 4dB(A) measurement tolerance is allowable for a given measurement.

§ 229.131 Sanders.

Except for MU locomotives, each locomotive shall be equipped with operable sanders that deposit sand on each rail in front of the first power operated wheel set in the direction of movement.

Subpart D—Design Requirements

§ 229.141 Body structure, MU locomotives.

(a) MU locomotives built new after April 1, 1956 that are operated in trains having a total empty weight of 600,000 pounds or more shall have a body structure designed to meet or exceed the following minimum specifications:

(1) The body structure shall resist a minimum static end load of 800,000 pounds at the rear draft stops ahead of the bolster on the center line of draft, without developing any permanent deformation in any member of the body structure.

(2) An anti-climbing arrangement shall be applied at each end that is designed so that coupled MU locomotives under full compression shall mate in a manner that will resist one locomotive from climbing the other. This arrangement shall resist a vertical load of 100,000 pounds without exceeding the yield point of its various parts or its attachments to the body structure.

(3) The coupler carrier and its connections to the body structure shall be designed to resist a vertical downward thrust from the coupler shank of 100,000 pounds for any horizontal position of the coupler, without exceeding the yield points of the materials used. When yielding type of coupler carrier is used, an auxiliary arrangement shall be provided that complies with these requirements.

(4) The outside end of each locomotive shall be provided with two main vertical members one at each side of the diaphragm opening, each main member shall have an ultimate shear value of not less than 300,000 pounds at a point even with the top of the underframe member to which it is attached. The attachment of these members at bottom shall be sufficient to develop their full shear value. If reinforcement is used to provide the shear value, the reinforcement shall have full value for a distance of 18 inches up from the underframe connection and then taper to a point approximately 30 inches above the underframe connection.

(5) The strength of the means of locking the truck to the body shall be at least the equivalent of an ultimate shear value of 250,000 pounds.

(b) MU locomotives built new after April 1, 1956 that are operated in trains having a total empty weight of less than 600,000 pounds shall have a body structure designed to meet or exceed the following minimum specifications:

(1) The body structure shall resist a minimum static end load of 400,000 pounds at the rear draft stops ahead of

the bolster on the center line of draft, without developing any permanent deformation in any member of the body structure.

(2) An anti-climbing arrangement shall be applied at each end that is designed so that coupled locomotives under full compression shall mate in a manner that will resist one locomotive from climbing the other. This arrangement shall resist a vertical load of 75,000 pounds without exceeding the yield point of its various parts or its attachments to the body structure.

(3) The coupler carrier and its connections to the body structure shall be designed to resist a vertical downward thrust from the coupled shank of 75,000 pounds for any horizontal position of the coupler, without exceeding the yield points of the materials used. When a yielding type of coupler carrier is used, an auxiliary arrangement shall be provided that complies with these requirements.

(4) The outside end of each MU locomotive shall be provided with two main vertical members, one at each side of the diaphragm opening: each main member shall have an ultimate shear value of not less than 200,000 pounds at a point even with the top of the underframe member to which it is attached. The attachment of these members at bottom shall be sufficient to develop their full shear value, the reinforcement shall have full value for a distance of 18 inches up from the underframe connection and then taper to a point approximately 30 inches above the underframe connection.

(5) The strength of the means of locking the truck to the body shall be at least the equivalent of an ultimate shear value of 250,000 pounds.

Appendix A—Form FRA 6180—49A

Editorial Note Appendix A. published at 45 FR 21118, Mar. 31, 1980, as part of the original document, is not carried in the CFR. Copies of Form FRA F6180—49A are available by contacting the Federal Railroad Administration, Office of Standards and Procedures, 400 7th St., SW., Washington, DC 20590

APPENDIX B—SCHEDULE OF CIVIL PENALTIES[1]

[See footnotes at the end of table.]

	Violation	Intentional[2] violation
Subpart A—General		
§ 229.7 Prohibited acts: Safety deficiencies not governed by specific regulation: To be assessed on relevant facts	$250-2,500	$250-2,500
§ 229.9 Movement of non-complying locomotives	([3])	([3])
§ 229.11 Locomotive identification	250	500
§ 229.13 Control of locomotives	1,000	1,500
§ 229.15 Final report	250	500
§ 229.17 Accident reports	1,000	1,500
§ 229.18 Prior waivers	([4])	([4])
Subpart B—Inspections and Tests		
§229.21 Daily inspection		
(a)(b):		
(i) Inspection overdue	$500	$1,000
(ii) Inspection report not made, improperly executed, or not retained	250	500
(c) Inspection not performed by a qualified person	500	750
§ 229.23 Periodic inspection: General		
(a)(b):		
(i) Inspection overdue	1,000	2,000
(ii) Inspection performed improperly or at a location where the underneath portion cannot be safely inspected	750	1,500
(c)(d):		
(i) Form missing	500	1,000
(ii) Form not properly displayed	250	500
(iii) Form improperly executed	500	1,000
(e)(f)	250	500
§ 229.25 Tests: Every periodic inspection	1,000	2,000
§ 229.27 Annual tests	1,000	2,000
§ 229.29 Biennial tests	1,000	2,000
§ 229.31 Main reservoir tests:		
(a)(b)	750	1,250
(c)(d)	1,000	1,500
§ 229.33 Out-of-use credit	250	500

APPENDIX B—SCHEDULE OF CIVIL PENALTIES[1]—Continued

[See footnotes at the end of table.]

	Violation	Intentional[2] violation
Subpart C—Safety Requirements		
§ 229.41 Protection against personal injury ..	$500	$750
§ 229.43 Exhaust and battery gases	750	1,000
§ 229.45 General condition: To be assessed based on relevant facts	250-2,500	250-2,500
§ 229.46 Brakes: General	1,000	1,500
§ 229.47 Emergency brake valve	500	750
§ 229.48 Main reservoir system:		
(a)	750	1,250
(b)(c)	500	1,000
§ 229.51 Aluminum main reservoirs	500	1,000
§ 229.53 Brake gauges	500	750
§ 229.55 Piston travel	500	750
§ 229.57 Foundation brake gear	750	1,250
§ 229.59 Leakage	500	750
229.61 Draft system	1,000	1,500
§ 229.63 Lateral motion	500	750
§ 229.64 Plain bearings	750	1,250
§ 229.65 Spring rigging	750	1,250
§ 229.67 Trucks	500	1,000
§ 229.69 Side bearings	750	1,250
§ 229.71 Clearance above top of rail	1,000	1,500
§ 229.73 Wheel sets	500	1,000
§ 229.75 Wheel and tire defects:		
(a)(d) Slid flat or shelled spot(s):		
(i) One spot 2½" or more but less than 3" in length	750	1,000
(ii) One spot 3" or more in length	1,500	2,000
(iii) Two adjoining spots each of which is more than 2" but less than 2½" in length	1,000	1,500
(iv) Two adjoining spots each of which are at least 2" in length, if either spot is 2½" or more in length	1,500	2,000
(b) Gouge or chip in flange of:		
(i) More than 1½" but less than 1⅝" in length; and more than ½" but less than ⅝" in width	1,000	1,500
(ii) 1⅝" or more in length and ⅝" or more in width	1,500	2,000
(c) Broken rim	1,000	1,500
(e) Seam in tread	500	1,000

APPENDIX B—SCHEDULE OF CIVIL PENALTIES[1]—Continued

[See footnotes at the end of table.]

	Violation	Intentional[2] violation
(f) Flange thickness of:		
(i) ⅞" or less but more than 1 1/16	1,500	2,000
(ii) 1 1/16" or less	2,000	2,500
(g) Tread worn hollow	750	1,000
(h) Flange height of:		
(i) 1½" or greater but less than 1⅞"	1,500	2,000
(ii) 1⅞" or more	2,000	2,500
(i) Tire thickness	750	1,250
(j) Rim thickness:		
(i) Less than 1" in road service and ¾" in yard service	1,500	2,000
(ii) 1 1/16" or less in road service and 1 1/4" in yard service	2,000	2,500
(k) Cracked or broken:		
(i) Crack of less than 1"	1,250	1,750
(ii) Crack of 1" or more	2,000	2,500
(iii) Break	2,500	2,500
(l) Loose wheel or tire	1,500	2,000
(m) Welded wheel or tire	2,000	2,500
§ 229.77 Current collectors	500	1,000
§ 229.79 Third rail shoes and beams	500	1,000
§ 229.81 Emergency pole: shoe insulation	500	1,000
§ 229.83 Insulation or grounding of metal parts	1,000	1,500
§ 229.85 Door and cover plates marked "Danger"	500	750
§ 229.87 Hand operated switches	500	750
§ 229.89 Jumpers: cable connections:		
(a)	500	750
(b)	1,000	1,500
§ 229.91 Motors and generators	1,000	1,500
§ 229.93 Safety cut-off device	500	750
§ 229.95 Venting	500	750
§ 229.97 Grounding fuel tanks	500	750
§ 229.99 Safety hangers	500	750
§ 229.101 Engines:		
(a)	1,000	1,500
(b)	500	750
(c)	1,000	1,500
§ 229.103 Safe working pressure: factor of safety	500	750

Appendix B—Schedule of Civil Penalties[1]—Continued

[See footnotes at the end of table.]

	Violation	Intentional[2] violation
§ 229.105 Steam generator number	250	500
§ 229.107 Pressure gauge	500	1,000
§ 229.109 Safety valves	1,000	1,500
§ 229.111 Water-flow indicator	500	750
§ 229.113 Warning notice	500	750
§ 229.115 Slip/slide alarms	1,000	1,500
§ 229.117 Speed indicators	750	1,000
§ 229.119 Cabs, floors, and passageways:		
(a):		
(i) Cab seat not securely mounted or braced	1,000	1,500
(ii) Insecure or inoperative latching device	500	1,000
(b)(c)(d)(e)(f)	500	750
§ 229.121 Locomotive cab noise	500	750
§ 229.123 Pilots, snowplows, and plates	500	1,000
§ 229.125 Headlights	1,000	1,500
§ 229.127 Cab lights	750	1,250
§ 229.129 Audible warning device	500	750
§ 229.131 Sanders	500	1,000
Subpart D—Design Requirements		
§ 229.141 Body structure, MU locomotives	500	1,000

[1] 45 U.S.C. 34 requires the Secretary of Transportation to assess a penalty of not less than $250 nor more than $2,500 for each and every violation of the Locomotive Inspection Act or any rule or regulation promulgated under that statute.

[2] For purposes of this schedule, an intentional violation is the knowing and willful failure of a carrier to comply with the provisions of this part. The knowledge required for an intentional violation is knowledge of the facts constituting the violation. Knowledge of the regulations is presumed by law. Evidence that a violation has been committed or has been allowed to continue after an FRA inspector has provided the center notification of non-compliance with this part is *prima facie* evidence that the violation was knowing and willful. Evidence that a repair has been made to a locomotive part or appurtenance but that such part or appurtenance was not brought into full compliance with this part is *prima facie* evidence that the violation was knowing and willful.

[3] Failure to observe any condition for movement set forth in paragraph (a) of § 229.9 will deprive the carrier of the exception and make the carrier liable for penalty under §§ 229.7 through 229.141.

[4] Failure to comply with this provision will result in the lapse of any affected waiver.

APPENDIX C—FRA LOCOMOTIVE STANDARDS—CODE OF DEFECTS

EDITORIAL NOTE: Appendix C, published at 45 FR 21121, Mar. 31, 1980, as part of the original document, is not carried in the CFR.

PART 230—LOCOMOTIVE INSPECTION

AUTHORITY: Secs. 1, 2, 5, 9, 36 Stat. 913, 914 (45 U.S.C. 22, 23, 28, 34); sec. 6(e) and (f), 80 Stat. 939, 940 (49 U.S.C. 1655(e) and (f))

§ 230.0 Steam powered locomotives.

(a) No railroad may use a steam powered locomotive on its line unless that locomotive meets the requirements of 49 CFR Part 230, Subpart A (§ § 230.1 to 230.55) and Subpart B (§ § 230.101 to 230.162) as in effect on October 1, 1978.

(b) Any interested person may consult the October 1, 1978 revision of 49 CFR Parts 200-999 or obtain a copy of these regulations by contacting the Federal Railroad Administration, Office of Standards and Procedures, 400 7th St., S.W., Washington, D.C. 20590.

[45 FR 21109, Mar. 31, 1980]

PART 231—RAILROAD SAFETY APPLIANCE STANDARDS

Sec.

231.1 Box and other house cars built or placed in service before October 1, 1966.
231.2 Hopper cars and high-side gondolas with fixed ends.
231.3 Drop-end high-side gondola cars.
231.4 Fixed-end low-side gondola and low-side hopper cars.
231.5 Drop-end low-side gondola cars.
231.6 Flat cars.
231.7 Tank cars with side platforms.
231.8 Tank cars without side sills and tank cars with short side sills and end platforms.
231.9 Tank cars without end sills.

minimum clearance of 2 inches around handle.

(4) *Manner of application.* Uncoupling levers shall be securely fastened with bolts or rivets.

(g) *Couplers.* Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

§ 231.16 Steam locomotives used in switching service.

(a) *Footboards*—(1) *Number.* Two or more.

(2) *Dimensions.* (i) Minimum width of tread, 10 inches.

(ii) Minimum height of back stop, 4 inches above tread.

(iii) Height from top of rail to top of tread, not more than 12 nor less than 9 inches.

(iv) If made of wood, minimum thickness of tread shall be 1½, preferably 2 inches.

(v) Footboards may be made of material other than wood which provides the same as or a greater degree of safety than wood of 1½ inches thickness. When made of material other than wood, the tread surface shall be of antiskid design and constructed with sufficient open space to permit the elimination of snow and ice from the tread surface.

(3) *Location.* Ends or sides. If on ends, they shall extend not less than 18 inches outside of guage of straight track, and shall be not more than 12 inches shorter than buffer-beam at each end.

(4) *Manner of application.* (i) End footboards may be constructed in two sections, provided that practically all space on each side of coupler is filled; each section shall be not less than 3 feet in length.

(ii) Footboards shall be securely bolted to two 1- by 4-inch metal brackets, provided footboard is not cut or notched at any point.

(iii) If footboard is cut or notched or in two sections, not less than four 1- by 3-inch metal brackets shall be used, two located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end sill or tank frame by not less than two ⅞-inch bolts.

(iv) If side footboards are used, a substantial handhold or rail shall be applied not less than 30 inches nor more than 60 inches above tread or footboard.

(b) *Sill steps*—(1) *Number.* Two or more.

(2) *Dimensions.* (i) Lower tread of step shall be not less than 8 by 12 inches, metal. (May have wooden treads.)

(ii) If stirrup steps are used, clear length of tread shall be not less than 10, preferably 12, inches.

(3) *Location.* One or more on each side at gangway secured to locomotive or tender.

(4) *Manner of application.* Sill steps shall be securely fastened with bolts or rivets.

(c) *End handholds*—(1) *Number.* Two.

(2) *Dimensions.* Minimum diameter, 1 inch, wrought iron or steel. Minimum clearance, 4 inches, except at coupler casting or braces when minimum clearance shall be 2 inches.

(3) *Location.* One on pilot, buffer-beam; one on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than 6 inches from ends of buffer-beam or end sill, securely fastened at ends.

(4) *Manner of application.* End handholds shall be securely fastened with bolts or rivets.

(d) *Side handholds*—(1) *Number.* Four.

(2) *Dimensions.* Minimum diameter, seven-eighths of an inch, wrought, iron or steel. Clear length equal to

approximate height of tank. Minimum clearance, 2, preferably 2½ inches.

(3) *Location.* Vertical. One on each side of tender near front corner; one on each side of locomotive at gangway.

(4) *Manner of application.* Side handholds shall be securely fastened with bolts or rivets.

(e) *Uncoupling levers*—(1) *Number.* Two double levers, operative from either side.

(2) *Dimensions.* (i) Handles of front-end levers shall be not more than 12, preferably 9, inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of 2 inches around handle.

(ii) Rear-end levers shall extend across end of tender with handles not more than 12, preferably 9, inches from side of tender, with a guard bent on handle to give not less than 2 inches clearance around handle.

(3) *Location.* One on rear end of tender and one on front end of locomotive.

(f) *Handrails and steps for headlights.* Switching locomotives with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

(g) *End-ladder clearance.* No part of locomotive or tender except draft rigging, coupler and attachments, safety chains, buffer block, footboard, brake pipe, signal pipe, steam-heat pipe or arms of uncoupling lever shall extend to within 14 inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer block or end sill.

(h) *Couplers.* Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

§ 231.17 Specifications common to all steam locomotives.

(a) *Hand brakes.*

(1) Hand brakes will not be required on locomotives nor on tenders when attached to locomotives.

(2) If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand brakes.

(b) *Running boards—*

(1) *Number.* Two.

(2) *Dimensions.* Not less than 10 inches wide. If of wood, not less than 1½ inches in thickness; if of metal, not less than three-sixteenths of an inch, properly supported.

(3) *Location.* One on each side of boiler extending from cab to front end near pilot-beam. (Running boards may be in sections. Flat-top steamchests may form section of running board.)

(4) *Manner of application.* (i) Running boards shall be securely fastened with bolts, rivets, or studs.

(ii) Locomotives having Wootten type boilers with cab located on top of boiler more than 12 inches forward from boiler head shall have suitable running boards running from cab to rear of locomotive, with handrailings not less than 20 nor more than 48 inches above outside edge of running boards, securely fastened with bolts, rivets, or studs.

(c) *Handrails—*

(1) *Number.* Two or more.

(2) *Dimensions.* Not less than 1 inch in diameter, wrought iron or steel.

(3) *Location.* One on each side of boiler extending from near cab to near front end of boiler, and extending across

front end of boiler, and extending across front end of boiler, not less than 24 nor more than 66 inches above running board.

(4) *Manner of application.* Handrails shall be securely fastened to boiler.

(d) *Tenders of Vanderbilt type.* (1) Tenders known as the Vanderbilt type shall be equipped with running boards; one on each side of tender not less than 10 inches in width and one on top of tender not less than 48 inches in width, extending from coal space to rear of tender.

(2) There shall be a handrail on each side of top running board, extending from coal space to rear of tank, not less than 1 inch in diameter and not less than 20 inches in height above running board from coal space to manhole.

(3) There shall be a handrail extending from coal space to within 12 inches of rear of tank, attached to each side of tank above side running board not less than 30 nor more than 66 inches above running board.

(4) There shall be one vertical end handhold on each side of Vanderbilt type of tender, located within 8 inches of rear of tank extending from within 8 inches of top of end sill to within 8 inches of side handrail. Post supporting rear end of side running board, if not more than 2 inches in diameter and properly located, may form section of handhold.

(5) An additional horizontal end handhold shall be applied on rear end of all Vanderbilt type of tenders which are not equipped with vestibules. Handhold to be located not less than 30 nor more than 66 inches above top of end sill. Clear length of handhold to be not less than 48 inches.

(6) Ladders shall be applied at forward ends of side running boards.

(e) *Handrails and steps for headlights.* (1) Locomotives having headlights which can not be safely and conveniently

reached from pilot-beam or steam chests shall be equipped with secure handrails and steps suitable for the use of men in getting to and from such headlights.

(2) A suitable metal end or side ladder shall be applied to all tanks more than 48 inches in height, measured from the top of end sill, and securely fastened with bolts or rivets.

(f) *Couplers.* Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

§ 231.18 Cars of special construction.

Cars of construction not covered specifically in the foregoing sections in this part, relative to handholds, sill steps, ladders, hand brakes and running boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill steps, ladders, hand brakes, and running boards as are required for cars of the nearest approximate type.

§ 231.19. Definition of "Right" and "Left."

"Right" or "Left" refers to side of person when facing end or side of car from ground.

§ 231.20 Variation in size permitted.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of 5 percent below size given is permitted.

§ 231.21 Tank cars without underframes.

(a) *Hand brakes—*

(1) *Number.* Same as specified for "Box and other house cars" (see § 231.1(a)(1)).

(2) *Dimensions.* Same as specified for "Box and other house cars" (see § 231.1(a)(2)).

(3) *Location.* Each hand brake shall be so located that it can be safely operated while car is in motion. The brake shaft shall be located on end of car to the left of center.

(4) *Manner of application.* Same as specified for "Box and other house cars" (see § 231.1(a)(4)).

(b) *End platforms*—

(1) *Number.* Two.

(2) *Dimensions.* Minimum width, ten inches. Minimum thickness, one and three-quarters inches.

(3) *Location.* One on each end extending across car a distance equal to or greater than any other portion of car. Outside edge of end platform shall extend not less than seven inches beyond bulge of tank head and safety railing.

(4) *Manner of application.* End platforms shall be securely fastened to the draft sills and be sufficiently rigid to prevent sagging.

(c) *Sill steps.* Same as specified for "Box and other house cars" (see § 231.1(d)).

(d) *End platform safety railing*—

(1) *Number.* Two.

(2) *Dimensions.* Minimum of seven-eighths inch diameter, wrought iron or steel, or one and one-quarter inch pipe. Minimum clearance, two and one-half inches.

(3) *Location.* One safety railing at each end of car shall extend horizontally across car not less than thirty-six inches nor more than fifty-four inches above end platform and extend downward within three inches of the end of the platform. The safety railing shall be located not more than six inches from the inside edge of the platform.

(4) *Manner of application.* Safety railings shall be supported at center of car and at each end by extending downward at the ends and attaching to the platform.

(e) *Side railing*—

(1) *Number.* Two.

(2) *Dimensions.* One and one-quarter inch pipe. Minimum clearance two and one-half inches.

(3) *Location.* One on each side of car, extending from end platform to end platform at a distance of not less than 51 inches from centerline of car, except that where break in side railing is necessary for side ladder or operating cabinet, the side railing shall be securely attached to such ladder and/or cabinet.

(4) *Manner of application.* Safety railings shall be securely attached to end platforms and supported from the car at intervals not exceeding ten feet.

(f) *Side handholds*—

(1) *Number.* Four.

(2) *Dimensions.* Same as specified for "Box and other house cars" (see § 231.1(h)(2)).

(3) *Location.* Four horizontal; one on face of end platform end, over sill

with a three-fourths (¾) inch black border containing the words "this car excess height" in lettering not less than one and one-half (1½) inches high.

(Secs. 2, 4, and 6, 27 Stat. 531, as amended; secs. 1 and 3, 32 Stat. 943, as amended; sec. 6(e) and (f), 80 Stat. 939 (45 U.S.C. 2, 4, 6, 8, and 10, 11-16 and 49 U.S.C. 103(c)(1))

[33 FR 19663, Dec. 25, 1968, as amended at 40 FR 34347, Aug. 15, 1975; 49 FR 26745, June 29, 1984]

§ 231.28 Box and other house cars with roof hatches built or placed in service after October 1, 1966.

The specifications of § 231.27 shall apply except as to the following:

(a) *Running boards.* Same as specified in § 231.1, except: the end of longitudinal running board shall be not less than six (6) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler horn against buffer block or end sill.

(b) *Ladders—*

(1) *Number.* Two (2).

(2) *Dimensions.*

(i) Minimum clear length of tread: Sixteen (16) inches.

(ii) Maximum spacing between treads nineteen (19) inches.

(3) *Location.* One (1) on each end of car not more than eight (8) inches from left-hand side.

(4) *Manner of application.* Same as specified in § 231.1.

(c) *Roof handholds—*

(1) *Number.* Two (2), one (1) over each ladder.

(2) *Dimensions.* Same as specified in § 231.1.

(3) *Location.* On roof of car. One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, except on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

(4) *Manner of application.* Same as specified in § 231.1.

(d) *End handholds.* (Treads of end ladders are end handholds.) Same as specified for § 231.27.

(e) *Existing box and other house cars with roof hatches.* Box and other house cars with roof hatches built on or before April 1, 1966, or under construction prior thereto and placed in service before October 1, 1966, shall be deemed equipped as nearly as possible within the intent of § 231.1 and of this section when: Equipped as specified in § 231.1, except (1) the side ladder treads above the fourth tread from bottom of side ladder near "A" end of car and roof handhold over the side ladder near "A" end shall be removed; (2) and (1) end platform handhold shall be provided on each end of car as specified in § 231.27(i); and when handbrake is operated near roof of car a brake step shall be provided as specified by § 231.1 or when handbrake is operated from approximate level of top of end sill the roof handhold over side ladder near "B" end and treads above the fourth tread from bottom of side ladder near "B" end shall be removed and a brake step as specified in § 231.1 shall be used with top of tread surface level with or not more than four (4) inches below adjacent end handhold.

(Secs. 2, 4, and 6, 27 Stat. 531, as amended; secs. 1 and 3, 32 Stat. 943, as amended; sec. 6(e) and (f), 80 Stat. 939 (45 U.S.C. 2, 4, 6, 8, and 10, 11-16 and 49 U.S.C. 103(c)(1))

[33 FR 19663, Dec. 25, 1968, as amended at 49 FR 26745, June 29, 1984]

§ 231.29 Road locomotives with corner stairways.

After September 30, 1979, road locomotives with corner stairway openings must be equipped with (a) uncoupling mechanisms that can be operated safely from the bottom stairway opening step as well as ground level, and (b) the vertical handholds and horizontal end handholds prescribed in § 231.30(e) and (g). No part of the uncoupling mechanism may extend into the stairway opening or end platform area when the mechanism is in its normal position or when it is operated. Each carrier shall so equip forty percent (40 percent) of its road locomotives by October 1, 1977, seventy percent (70 percent) by October 1, 1978, and all its road locomotives by October 1, 1979.

[41 FR 37783, Sept. 8, 1976]

§ 231.30 Locomotives used in switching service.

(a) *General requirements.*

(1) Except for steam locomotives equipped as provided in § 231.16 of this part, all locomotives used in switching service built after March 31, 1977, must be equipped as provided in this section.

(2) Except for steam locomotives equipped as prescribed in § 231.16 of this part, all locomotives built prior to April 1, 1977, used in switching service after September 30, 1979, shall be equipped as provided in this section. Each carrier shall so equip forty percent (40 percent) of such locomotives by October 1, 1977, seventy percent (70 percent) by October 1, 1978, and all such locomotives by October 1, 1979.

(3) Locomotives without corner stairway openings may not be used to perform any switching service after September 30, 1979 except passenger car switching service at passenger stations.

(b) *Definitions.*

(1) "Locomotive used in switching service" means a locomotive regularly assigned to perform yard switching service.

(2) "Switching Service" means the classification of cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing, placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a road movement. However, this term does not include movement of a train or part of a train within yard limits by the road locomotive and the placement of locomotives or cars in a train or their removal from a train by the road locomotive while en route to the train's destination.

(3) "Safety tread surface" means that portion of anti-skid surface of a switching step that actually is contacted by a shoe or boot.

(4) "Uncoupling mechanism" means the arrangement for operating the coupler lock lift, including the uncoupling lever and all other appurtenances that facilitate operation of the coupler.

(c) *Switching step*—

(1) *Number.* Each locomotive used in switching service must have four (4) switching steps. (See Plate A)

(2) *Dimensions.* Each such switching step must have—

(i) On locomotives built after March 31, 1977, a minimum width of twenty-four (24) inches and a minimum depth of twelve (12) inches, except when necessary to accommodate the turning are of a six-wheel truck and its appurtenances, the inside edge of the switching step shall have a minimum width of seventeen (17) inches (See Plate B);

(ii) On locomotives built prior to April 1, 1977, a minimum width of eighteen (18) inches, and a minimum depth of eight (8) inches;

(iii) A backstop, solid or perforated, with minimum height of backstop of six (6) inches above the safety tread surface; and

(iv) A height of not more than nineteen (19) inches, preferably fifteen (15) inches, measured from top of rail to the safety tread surface.

(3) *Location.* Switching steps must be located on each side near each end of a locomotive used in switching service. The bottom step of the stairway at these locations may also serve as a switching step it it meets all of the requirements of this section.

(4) *Manner of application.*

(i) Switching steps must be supported by a bracket at each end and fastened to the bracket by two bolts or rivets of at least one-half (½) inch diameter or by a weldment or at least twice the strength of a bolted attachment.

(ii) Vertical clearance must be unobstructed, except for minor intrusions created by mechanical fasteners or a small triangular gusset plate at the platform level walkway, and free for use for a least a distance of eighty-four (84) inches over a portion of the switching step that is not less than seven (7) inches deep by eighteen (18) inches wide on locomotives built prior to April 1, 1977, and of not less than seven (7) inches deep by twenty-four (24) inches wide on locomotives built after March 31, 1977.

(5) *Material.*

(i) Steel or other material of equivalent or better strength and deflection characteristics, anti-skid, safety

design, having at least fifty percent (50%) of the tread surface as open space must be used.

(ii) When the step material creates a second level safety tread surface, the maximum difference in surface levels may not exceed three-eighths (3/8) of an inch.

(iii) The safety tread surface must extend to within one-half (1/2) inch of each edge of the step.

(6) *Visibility.* The outer edge of each switching step that is not illuminated must be painted a contrasting color. On locomotives built after March 31, 1977, switching steps shall be illuminated; on multiple-unit locomotive consists used in switching service, only the front switching steps of the leading unit and the rear switching steps of the trailing unit must be illuminated.

(d) *End footboards and pilot steps.*

(1) Except for steam locomotives equipped as provided in § 231.16, locomotives used in switching service built after March 31, 1975, may not be equipped with end footboards or pilot steps.

(2) Except for steam locomotives equipped as provided in § 231.16, locomotives used in switching service built before April 1, 1975, may not be equipped with end footboards or pilot steps after September 30, 1978. Whenever end footboards or pilot steps are removed from a locomotive, the uncoupling mechanism and horizontal end handholds of the locomotive must be modified to comply with paragraphs (f) and (g) of this section.

(e) *Vertical handholds.* Each switching step must be provided with two (2) vertical handholds or handrails, one on each side of the switching step stairway.

(1) On locomotives built after March 31, 1977, each vertical handhold must—

(i) Be constructed of wrought iron, steel or other material of equivalent strength and durability that is at

least one (1) inch diameter and be securely fastened to the locomotive with one-half (½) inch or larger bolts or rivets;

(ii) Begin not less than six (6) inches nor more than thirty-two (32) inches above the safety tread surface of the switching step; on units with high snowplows, each must begin not more than thirty-six (36) inches above the safety tread surface of the switching step;

(iii) Extend upward from switching step surface at least forty-eight (48) inches;

(iv) Be painted in a contrasting color to a height of at least forty-eight (48) inches above the safety tread surface of the switching step; and

(v) Provide at least two and one-half (2½) inches of usable hand clearance throughout its entire length.

(2) On locomotives built before April 1, 1977, each vertical handhold must—

(i) Be constructed of wrought iron, steel or other material of equivalent strength and durability that is at least seven-eighths (⅞) inch in diameter and be securely fastened with one-half (½) inch or larger bolts or rivets;

(ii) Begin not less than five (5) inches nor more than thirty-two (32) inches above the safety tread surface; on units with high snowplows, each must begin not more than thirty-six (36) inches above the safety tread surface;

(iii) Extend upward from safety tread surface of the switching step at least forty-eight (48) inches;

(iv) Be painted in a constrasting color to a height of at least forty-eight (48) inches above the safety tread surface of the switching step; and

(v) Provide at least two and one-half (2½) inches usable hand clearance throughout its entire length.

(f) *Uncoupling mechanisms.* Each locomotive used in switching service must have means for operating the uncoupling mechanism safely from the switching step as well as from ground level. No part of the uncoupling mechanism may extend into the switching step or stairway opening or end platform area when the mechanism is in its normal position or when it is operated. (See Plate A)

(g) *Horizontal end handholds.* Each locomotive used in switching service must have four (4) horizontal end handholds.

(1) Each horizontal end handhold must—

(i) Be constructed of wrought iron, steel or other material of equivalent strength and durability that is at least five-eighths (⅝) inch in diameter and be securely fastened to the locomotive with one-half (½) inch or larger bolts or rivets;

(ii) Be located not less than thirty (30) inches nor more than fifty (50) inches above the top of rail with its outer end not more than 16 inches from the side of the locomotive; on units with a high snowplow that makes normal end handhold location inaccessible, end handhold shall be located on top of plow blade, with the center of the handhold not more than fifty-three (53) inches above the top of rail, and be in line with the slope of the plow blade;

(iii) Be at least fourteen (14) inches long; and

(iv) Provide at least two (2) inches, preferably two and one-half (2½) inches, usable hand clearance throughout its entire length.

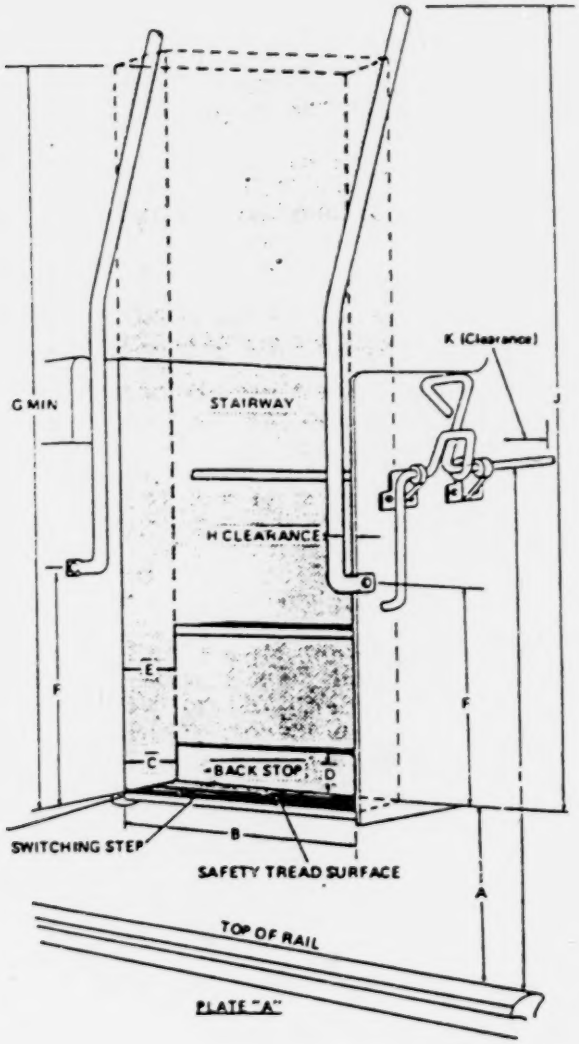
(2) An uncoupling lever may also serve as a horizontal end handhold if it complies with the requirements of this paragraph. When an uncoupling lever also serves as the horizontal end handhold, it is considered to be securely fastened if its securement brackets are attached to the locomotive by one-half (½) inch or larger bolts or rivets and its movement between those brackets is limited to the rotation necessary for performance of the uncoupling function.

ITEM		DIMENSION			
		NEW UNITS		EXISTING UNITS	
A.	Height of switching step above rail	15″ 19″	preferred maximum	15″ 19″	preferred maximum
B.	Minimum width of switching step (between stairway supports)	24″		18″	
C.	Minimum depth of switching step	12″		8″	
D.	Minimum height of backstop	6″		6″	
E.	Minimum distance from front edge of switching step to front edge of first step above	7″		7″	
F.	Distance above switching step for start of vertical handholds Minimum-Maximum	6″ • 32″		5″ • 32″	
	EXCEPTION: Maximum for units with high snowplows	36″		36″	
G.	Clear height above switching step	84″		84″	
H.	Vertical handhold clearance	2½″	minimum	2½″	minimum
I.	Height above top of rod for horizontal handhold or uncoupling lever if used as horizontal handhold				
	EXCEPTION: Maximum for units with high snowplow	30″ • 50″ 53″		30″ • 50″ 53″	
J.	Minimum height above switching step of vertical handhold	48″		48″	
K.	Horizontal handhold clearance or uncoupling lever clearance, if used as horizontal handhold	2″ • 2½″		2″ • 2½″	

NOTES:

1. Switching steps must be supported by a bracket at each end and fastened to the bracket by two bolts or rivets of at least one-half (½) inch diameter or by a weldment of at least twice the strength of a bolted attachment.
2. The outer edge of each switching step that is not illuminated must be painted a contrasting color.
3. Vertical handholds must be painted in a contrasting color to a height of at least forty-eight (48) inches above the safety tread surface of the switching step.

See Chart on next page.


K (Clearance)
G MIN
STAIRWAY
H CLEARANCE
E
F
C
BACK STOP
D
B
SWITCHING STEP
SAFETY TREAD SURFACE
A
TOP OF RAIL
PLATE "A"

with sufficient force to ascertain whether or not brakes are operating properly. If air brakes do not properly operate, train must be stopped, cause of failure ascertained and corrected and running test repeated.

§ 232.17 Freight and passenger train car brakes.

(a) *Testing and repairing brakes on cars while on shop or repair tracks.*

(1) When a freight car having brake equipment due for periodic attention is on shop or repair tracks where facilities are available for making air brake repairs, brake equipment must be given attention in accordance with the requirements of the currently effective AAR Code of Rules for cars in interchange. Brake equipment shall then be tested by use of a single car testing device as prescribed by the currently effective AAR Code of Tests.

(2)(i) When a freight car having an air brake defect is on a shop or repair track, brake equipment must be tested by use of a single car testing device as prescribed by currently effective AAR Code of Tests.

(ii) All freight cars on shop or repair tracks shall be tested to determine that the air brakes apply and release. Piston travel on a standard body mounted brake cylinder which is less than 7 inches or more than 9 inches must be adjusted to nominally 7 inches. Piston travel of brake cylinders on all freight cars equipped with other than standard single capacity brake, must be adjusted as indicated on badge plate or stenciling on car located in a conspicuous place near brake cylinder. After piston travel has been adjusted and with brakes released, sufficient brake shoe clearance must be provided.

(iii) When a car is equipped for use in passenger train service not due for periodical air brake repairs, as indicated by stenciled or recorded cleaning dates, is on shop or repair tracks, brake equipment must be tested

by use of a single car testing device as prescribed by currently effective AAR Code of Tests. Piston travel of brake cylinders must be adjusted if required, to the standard travel for that type of brake cylinder. After piston travel has been adjusted and with brakes released, sufficient brake shoe clearance must be provided.

(iv) Before a car is released from a shop or repair track, it must be known that brake pipe is securely clamped, angle cocks in proper position with suitable clearance, valves, reservoirs and cylinders tight on supports and supports securely attached to car.

(b)(1) Brake equipment on cars other than passenger cars must be cleaned, repaired, lubricated and tested as often as required to maintain it in a safe and suitable condition for service but not less frequently than as required by currently effective AAR Code of Rules for cars in interchange.

(2) Brake equipment on passenger cars must be clean, repaired, lubricated and tested as often as necessary to maintain it in a safe and suitable condition for service but not less frequently than as required in Standard S-045 in the Manual of Standards and Recommended Practices of the AAR.

(3) Copies of the materials referred to in this section can be obtained from the Association of American Railroads, 1920 L Street, N.W., Washington, D.C. 20036.

(72 Stat. 86 (45 U.S.C. 9); sec. 6(e), (f), 80 Stat. 939 (49 U.S.C. 1655); and sec. 1.49(c) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(c))

[47 FR 36795, Aug. 23, 1982 and 49 FR 1988, Jan. 17, 1984]

§ 232.19 End of train device.

(a) An end of train device shall be comprised of a rear-of-train unit (rear unit) located on the last car of a train and

a front-of-train (front unit) unit located in the cab of the locomotive controlling the train.

(b) *Rear unit.* The rear unit shall be capable of determining the rear car brake pipe pressure and transmitting that information to the front unit for display to the locomotive engineer. The rear unit shall be—

(1) Capable of measuring the rear car brake pipe pressure with an accuracy of ±3 psig and brake pipe pressure variations of ±1 psig;

(2) Equipped with a "bleeder valve" that permits the release of any air under pressure from the rear of train unit or the associated air hoses prior to detaching the rear unit from the brake pipe;

(3) Designed so that an internal failure will not cause an undesired emergency brake application;

(4) Equipped with either an air gauge or a means of visually displaying the rear unit's brake pipe pressure measurement; and

(5) Equipped with a pressure relief safety valve to prevent explosion from a high pressure air leak inside the rear unit.

(c) *Reporting rate.* Multiple data transmissions from the rear unit shall occur immediately after a variation in the rear car brake pipe pressure of ±2 psig and at intervals of not greater than 70 seconds when the rear car brake pipe pressure variation over the 70-second interval is less than ±2 psig.

(d) *Operating environment.* The rear unit shall be designed to meet the performance requirements of paragraphs (b) and (c) of this section under the following environmental conditions:

(1) At temperatures from −40 °C to 60 °C;

(2) At a relative humidity of 95% noncondensing at 50 °C;

(3) At altitudes of zero to 12,000 feet mean sea level;

(4) During vertical and lateral vibrations of 1 to 15 Hz., with 0.5 g. peak to peak, and 15 to 500 Hz., with 5 g. peak to peak;

(5) During the longitudinal vibrations of 1 to 15 Hz., with 3 g. peak to peak, and 15 to 500 Hz., with 5 g. peak to peak; and

(6) During a shock of 10 g. peak for 0.1 second in any axis.

(e) *Unique code.* Each rear unit shall have a unique and permanent identification code that is transmitted along with the pressure message to the front-of-train unit. A code obtained from the Association of American Railroads, 50 F Street, NW., Washington, DC 20036 shall be deemed to be a unique code for purposes of this section. A unique code also may be obtained from the Office of Safety Enforcement (RRS-10), Federal Railroad Administration, Washington, DC 20590.

(f) *Front unit.* (1) The front unit shall be designed to receive data messages from the rear unit and shall be capable of displaying the rear car brake pipe pressure in not more than one-pound increments.

(2) The display shall be clearly visible and legible in daylight and darkness from the engineer's normal operating position.

(3) The front device shall have a means for entry of the unique identification code of the rear unit being used. The front unit shall be designed so that it will display a message only from the rear unit with the same code as entered into the front unit.

(4) The front unit shall be designed to meet the requirements of 232.19(d)(2), (3), (4), and (5). It shall also be

designed to meet the performance requirements in this paragraph—

(i) At temperatures from 0°C to 60°C;

(ii) During a vertical or lateral shock of 2 g. peak for 0.1 second; and

(iii) During a longitudinal shock of 5 g. peak for 0.1 second.

(g) *Radio equipment.*

(1) The radio transmitter in the rear unit and the radio receiver in the front unit shall comply with the applicable regulatory requirements of the FCC and use of a transmission format acceptable to the FCC.

(2) If power is supplied by one or more batteries, the operating life shall be a minimum of 36 hours at 0°C.

(h) *Inspection.*

(1) Upon installation of an end-of-train device, it shall be determined that the identification code entered into the front unit is identical to the unique identification code on the rear-of-train unit.

(2) The functional capability of the device shall be determined at the point of installation, after charging the train, by comparing the quantitative value displayed on the front unit with the quantitative value displayed on the rear unit or on an air gauge. The end device may not be used if the difference between the two readings exceeds three pounds.

(3) The rear unit shall be calibrated for accuracy at least every 92 days. A tag, sticker, or other method of information storage that provides the date of the last calibration, the location where the calibration was made, and the name of the person doing the calibration shall be affixed to the rear unit.

APPENDIX C—SCHEDULE OF CIVIL PENALTIES

	Violation	Intentional violation[1]
Section 221.13	750	1,500
Improper location	1,000	2,500
Device not present	1,500	2,500
Section 221.14:		
Use of unapproved device	500	1,000
Use of device with improper intensity, beam width, color, flash rate	500	1,000
Section 221.15:		
Failure to inspect at crew change	750	1,500
Improper inspection	750	1,500
Section 221.16:		
Failure to obtain protection	750	2,000
Improper protection	750	1,500
Section 221.17:		
Excessive movement after enroute failure	1,000	2,000

[1]For the purpose of this schedule, an intentional violation is the knowing and willful failure of a carrier or its officers or agents to comply with the provisions of this part. The Administrator reserves the authority to assess the maximum penalty for a violation of any section or subsection contained in Part 221.

[51 FR 25186, July 10, 1986]

PART 223—SAFETY GLAZING STANDARDS—LOCOMOTIVES, PASSENGER CARS AND CABOOSES

Subpart A—General

Sec.

223.1 Scope.
223.3 Application.
223.5 Definitions.
223.7 Responsibility.

Subpart B—Specific Requirements

223.9 Requirements for new or rebuilt equipment.
223.11 Requirements for existing locomotives.
223.13 Requirements for existing cabooses.
223.15 Requirements for existing passenger cars.
223.17 Identification of equipped locomotives, passenger cars and cabooses.

APPENDIX A—CERTIFICATION OF GLAZING MATERIALS

APPENDIX B—SCHEDULES OF CIVIL PENALTIES

AUTHORITY: Sec. 202, 84 Stat. 971 (45 U.S.C. 431); 49 CFR 1.49(n).

SOURCE: 44 FR 77352, Dec. 31, 1979, unless otherwise noted.

Subpart A—General

§ 223.1 Scope.

This part provides minimum requirements for glazing materials in order to protect railroad employees and railroad passengers from injury as a result of objects striking the windows of locomotives, caboose and passenger cars.

§ 222.3 Application.

(a) This part applies to railroads that operate rolling equipment on standard gauge track that is a part of the general railroad system of transportation.

(b) This part does not apply to—

(1) Locomotives, cabooses, and passenger cars that operate only on track inside an installation that is not part of the general railroad system of transportation;

(2) A rapid transit railroad that operates only on track used exclusively for short haul rapid transit passenger service in a metropolitan or suburban area; and

(3) Locomotives, passenger cars and cabooses that are historical or antiquated equipment and are used only for excursion, educational, recreational purposes or private transportation purposes.

(4) Locomotives that are used exclusively in designated service as defined in § 223.5(m).

§ 223.5 Definitions.

As used in this part—

(a) "Locomotive" means a self-propelled unit of equipment designed primarily for moving other equipment. It does not include self-propelled passenger cars.

(b) "Caboose" means a car in a freight train intended to provide transportation for crew members.

(c) "Passenger car" means a unit of rolling equipment intended to provide transportation for members of the general public and includes self-propelled cars designed to carry baggage, mail, express and passengers.

(d) "Yard" is a system of auxiliary tracks used exclusively for the classification of passenger or freight cars according to commodity or destination; assembling of cars for train movement; storage of cars; or repair of equipment.

(e) "Yard locomotive" means a locomotive that is operated only to perform switching functions within a single yard area.

(f) "Yard caboose" means a caboose that is used exclusively in a single yard area.

(g) "Rebuilt locomotive, caboose or passenger car" means a locomotive, caboose or passenger car that has undergone overhaul which has been identified by the railroad as a capital expense under Interstate Commerce Commission accounting standards.

(h) "Windshield" means the combination of individual units of glazing material of the locomotive, passenger car, or caboose that are positioned in an end facing glazing location.

(i) "End facing glazing location" means any location where a line perpendicular to the plane of the glazing material makes a horizontal angle of 50 degrees or less with the centerline of the locomotive, caboose or passenger car. Any location which, due to curvature of the glazing material, can meet the criteria for either a front facing location or a side facing location shall be considered a front facing location.

(j) "Side facing glazing location" means any location where a line perpendicular to the plane of the glazing material makes an angle of more than 50 degrees with the centerline of the locomotive, caboose or passenger car.

(k) "Certified glazing" means a glazing material that has been certified by the manufacturer as having met the testing requirements set forth in Appendix A of this part and that has been installed in such a manner that it will perform its intended function.

(l) "Emergency opening window" means that segment of a side facing glazing location which has been designed to permit rapid and easy removal during a crisis situation.

(m) "Designated service" means exclusive operation of a locomotive under the following conditions:

(1) The locomotive is not used as an independent unit or the controlling unit is a consist of locomotives except

when moving for the purpose of servicing or repair within a single yard area;

(2) The locomotive is not occupied by operating or deadhead crews outside a single yard area; and

(3) The locomotive is stenciled "Designated Service—DO NOT OCCUPY".

(n) "Locomotive cab" means that portion of the superstructure designed to be occupied by the crew while operating the locomotive.

[44 FR 77352, Dec. 31, 1979; 45 FR 49271, July 24, 1980]

§ 223.7 Responsibility.

(a) A railroad that fails to comply with any requirement of this part with respect to any locomotive, passenger car or caboose which it operates is subject to a civil penalty as provided in Appendix B of this part. Each day of violation constitutes a separate offense.

(b) A railroad may petition the Federal Railroad Administrator for exemption from any or all requirements prescribed in this part. Each petition shall be filed in accordance with Part 211 of this chapter.

Subpart B—Specific Requirements

§ 223.9 Requirements for new or rebuilt equipment.

(a) Locomotives, including yard locomotives, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all locomotive cab windows.

(b) Cabooses, including yard cabooses, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows.

(c) Passenger cars, including self-propelled passenger cars, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows and at least four emergency opening windows.

[44 FR 77352, Dec. 31, 1979, as amended at 45 FR 49271, July 24, 1980]

§ 223.11 Requirements for existing locomotives.

(a) Locomotives, other than yard locomotives, built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the locomotive cab windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Locomotives, other than yard locomotives, built or rebuilt prior to July 1, 1980, which are equipped in all locomotive cab side facing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the sidefacing glazing location except to replace sidefacing glazing material that is broken or damaged.

(c) Except for yard locomotives and locomotives equipped as described in paragraphs (a) and (b) of this section, locomotives built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all locomotive cab windows after June 30, 1984.

(d) Each locomotive subject to the provisions of paragraph (c) of this section which, as a result of an act of vandalism has a locomotive cab window that is broken or damaged so that the window fails to permit good visibility—

(1) Shall be placed in Designated Service within 48 hours of the time of breakage or damage or

(2) Shall be removed from service until equipped with certified glazing in the following manner:

(i) If the broken or damaged window is a part of the windshield of the locomotive cab, all of the forward and rearward end facing glazing locations of the locomotive cab must be replaced with certified glazing.

(ii) If the broken or damaged window is a part of the sidefacing window of the locomotive cab, all of the sidefacing glazing locations of the locomotive cab must be replaced with certified glazing.

(Sec. 209 of the Federal Railroad Safety Act, 94 Stat. 957 (45 U.S.C. 438); sec. 1.49(m) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(m))

[45 FR 49271, July 24, 1980, as amended at 48 FR 24083, May 31, 1983; 46 FR 56956, Dec. 27, 1983]

§ 223.13 Requirements for existing cabooses.

(a) Cabooses, other than yard cabooses, built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Cabooses, other than yard cabooses, built or rebuilt prior to July 1, 1980, which are equipped in all side facing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under the provisions of Appendix A of this part, will not require the installation of certified glazing in

the sidefacing glazing locations except to replace sidefacing glazing material that is broken or damaged.

(c) Except for yard cabooses and cabooses equipped as described in paragraphs (a) and (b), cabooses built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all windows after June 30, 1984.

(d) Each caboose subject to the provision of paragraph (c) of this section, which, as a result of an act of vandalism, has a window that is broken or damaged so that the window fails to permit good visibility shall be equipped with certified glazing in the following manner:

(1) If the broken window is a part of the windshield, all of the forward and rearward end facing glazing locations must be replaced with certified glazing within 30 days of the date of breakage or damage.

(2) If the broken window is a part of the sidefacing window, all of the sidefacing glazing locations must be replaced with certified glazing within 30 days of the date of breakage.

(Sec. 209 of the Federal Railroad Safety Act, 94 Stat. 957 (45 U.S.C. 438); sec. 1.49(m) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(m))

[44 FR 77352, Dec. 31, 1979, as amended at 48 FR 24083, May 31, 1983; 48 FR 56956, Dec. 27, 1983]

§ 223.15 Requirements for existing passenger cars.

(a) Passenger cars built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Passenger cars built or rebuilt prior to July 1, 1980, which are equipped in the sidefacing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under the provisions of Appendix A of this part, will not require the installation of certified glazing except to replace sidefacing glazing material that is broken or damaged.

(c) Except for passenger cars described in paragraphs (a) and (b), passenger cars built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all windows and a minimum of four emergency windows after June 30, 1984.

(d) Each passenger car subject to the provisions of paragraph (c) of this section which as a result of an act of vandalism, has a window that is broken or damaged so that the window fails to permit good visibility shall be equipped with certified glazing in the following manner:

(1) When the broken window is a part of the windshield, all of the forward and rearward end facing glazing locations shall be replaced with certified glazing within 30 days of breakage.

(2) When the broken window is a part of the sidefacing window, the glazing in that individual sidefacing glazing location shall be replaced with certified glazing within 30 days of the date of breakage.

(Sec. 209 of the Federal Railroad Safety Act, 94 Stat. 957 (45 U.S.C. 438); sec. 1.49(m) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(m)) [44 FR 77352, Dec. 31, 1979, as amended at 48 FR 24083, May 31, 1983; 48 FR 56956, Dec. 27, 1983]

§ 223.17 Identification of equipped locomotives, passenger cars and cabooses.

Each locomotive, passenger car and caboose that is fully equipped with glazing materials that meet the requirements of this part shall be stencilled on an interior wall as follows:

"Fully Equipped FRA Part 223 glazing" or similar words conveying that meaning in letters at least ⅜ inch high.

[45 FR 49271, July 24, 1980]

Appendix A—Certification of Glazing Materials

As provided in this part, certified glazing materials installed in locomotives, passenger cars, or cabooses must be certified by the glazing manufacturer in accordance with the following procedures:

a. General Requirements

(1) Each manufacturer that provides glazing materials, intended by the manufacturer for use in achieving compliance with the requirements of this part, shall certify that each type of glazing material being supplied for this purpose has been successfully tested in accordance with this appendix and that test verification data is available to a railroad or to FRA upon request.

(2) The test verification data shall contain all pertinent original data logs and documentation that the selection of material samples, test set-ups, test measuring devices, and test procedures were performed by qualified personnel using recognized and acceptable practices and in accordance with this appendix.

b. Testing Requirements

(1) The material to be tested (Target Material) shall be a full scale sample of the largest dimension intended to be produced and installed.

(2) The Target Material shall be representative of production material and shall be selected on a documented random choice basis.

(3) The Target Material shall be securely and rigidly attached in a fixture so that the fixture's own characteristics will not induce test errors.

(4) The Target Material so selected and attached shall constitute a Test Specimen.

(5) The Test Specimen will then be equipped with a Witness Plate that shall be mounted parallel to and at a distance of six inches in back of the Target Material. The Witness Plate shall have at least an area which will cover the full map of the Target Material.

(6) The Witness Plate shall be an unbacked sheet of maximum 0.006 inch, alloy 1100 temper O, aluminum stretched within the perimeter of a suitable frame to provide a taut surface.

(7) The Test Specimen will be positioned so that the defined projectile impacts it at an angle of 90 degrees to the Test Specimen surface.

(8) The point of impact of the defined projectile will be within a radius of 3″ of the centroid of the Target Material.

(9) Velocity screens or other suitable velocity measuring devices will be positioned so as to measure the impact velocity of the defined projectile within a 10% accuracy tolerance, with test modifications made to guarantee that the stipulated minimum velocity requirements are met.

(10) The Test Specimen for glazing material that is intended for use in end facing glazing locations shall be subjected to a Type I test regimen consisting of the following tests:

(i) Ballistic Impact in which a standard 22 caliber long rifle lead bullet of 40 grains in weight impacts at a minimum of 960 feet per second velocity.

(ii) Large Object Impact in which a cinder block of 24 lbs minimum weight with dimensions of 8 inches by 8 inches by 16 inches nominally impacts at the corner of the block at a minimum of 44 feet per second velocity.

The cinder block must be of composition referenced in American Society for Testing and Materials (ASTM) Specification C33L or ASTM C90.

(11) The Test Specimen for glazing material that is intended for use only in side facing glazing locations shall be subjected to a Type II test regimen consisting of the following tests:

(i) Ballistic Impact in which a standard 22 caliber long rifle lead bullet of 40 grains in weight impacts at a minimum of 960 feet per second velocity.

(ii) Large Object Impact in which a cinder block of 24 lbs minimum weight with dimensions of 8 inches by 8 inches by 16 inches nominally impacts at the corner of the block at a minimum of 12 feet per second velocity. The cinder block must be of the composition referenced in ASTM C33L or ASTM C90.

(12) Three different test specimens must be subjected to the ballistic impact portion of these tests.

(13) Two different test specimens must be subjected to the large object impact portion of these tests.

(14) A material so tested must perform so that:

(i) there shall be no penetration of the back surfaces (side closest to Witness Plate) of the Target Material by the projectile. Partial penetration of the impact (front) surface of the Target Material does not constitute a failure; and

(ii) there shall be no penetration of particles from the back side of the Target Material through the back side of the prescribed Witness Plate.

(15) Test specimens must consecutively pass the required number of tests at the required minimum velocities. Individual tests resulting in failures at greater than the required minimum velocities may be repeated but a failure

of an individual test at less than the minimum velocity shall result in termination of the total test and failure of the material.

(16) After successful completion of the prescribed set of required consecutive tests, a manufacturer may certify in writing that a particular glazing material meets the requirements of these standards.

c. Material Identification

(1) Each individual unit of glazing material shall be permanently marked, prior to installation, to indicate that this type of material has been successfully tested as set forth in this appendix and that marking shall be done in such a manner that it is clearly visible after the material has been installed.

(2) Each individual unit of a glazing material that has successfully passed the Type I testing regimen shall be marked to indicate:

(i) "FRA Type I" material;

(ii) the manufacturer of the material;

(iii) the type or brand identification of the material.

(3) Each individual unit of a glazing material that has successfully passed the Type II testing regimen shall be marked to indicate:

(i) "FRA Type II" material;

(ii) the manufacturer of the material;

(iii) the type or brand identification of the material.

APPENDIX B—SCHEDULE OF CIVIL PENALTIES[1]

Section	Violation	Intentional violation[2]
223.9 (a) New or	$1,000	$1,500
(b) Rebuilt equipment	1,000	1,500
(c)	1,000	1,500
223.11(c): Existing locomotives	750	1,250
(d)	500	1,000
223.13(c) Existing cabooses	750	1,250
(d)	500	1,000
223.15(c) Existing passenger cars	750	1,250
(d)	500	1,000
223.17 Identification of units	250	500

Note on multiple violations. When two or more violations of these regulations are discovered with respect to a single locomotive, passenger car or caboose that is continued in service by a railroad, the appropriate penalties set forth above are aggregated up to a maximum of $2,500 per day.

[1]Section 209 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 438) requires the Secretary of Transportation to "include in, or make applicable to, any railroad safety rule, regulation, order, or standard issued under this title a civil penalty for violation thereof . . . in such amount, not less than $250 nor more than $2,500, as he deems reasonable." Each day of violation constitutes a separate offense.

[2]For purposes of this schedule, an intentional violation is the knowing and willful failure of a railroad to comply with the provisions of this part. The knowledge required for an intentional violation is knowledge of the facts constituting the violation. Knowledge of the regulations is presumed by law. Evidence that a violation has been committed or has been allowed to continue after an FRA or State inspector has provided the railroad notification of a deviation from the requirement of this part is prima facie evidence that the violation was knowing and willful. Evidence that a repair has been made to a freight car component but that component was not brought into full compliance with the standards is prima facie evidence that the violation was knowing and willful.

(Sec. 209, 84 Stat. 975 (45 U.S.C. 438); 49 CFR 1.49(n))

APPENDIX F

460.302 Penalty; recovery, disposition

Sec. 2. Any person, corporation or association neglecting or failing to comply with, or who shall violate the provisions of this act or fail to perform the conditions imposed by the commission as provided in section 1 of this act, shall be liable to a fine of not less than 1,000 dollars nor more than 5,000 dollars for each offense, which may be recovered in an action by the attorney general in the name of the people of the state of Michigan in any court of record, and when so collected shall be paid into the state treasury to the credit of the general fund.

460.558 Same; order mandatory; failure to comply, penalty

Sec. 8. Every corporation, its officers, agents and employes, and all persons and firms engaged in the business of furnishing electricity as aforesaid shall obey and comply with every lawful order made by the commission under the authority of this act so long as the same shall remain in force. Any corporation or person engaged in such business or any officer, agent, or employe thereof, who wilfully or knowingly fails or neglects to obey or comply with such order or any provision of this act shall forfeit to the state of Michigan not to exceed the sum of 300 dollars for each offense. Every distinct violation of any such order or of this act, shall be a separate offense, and in case of a continued violation, each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this state in the name of the people of the state of Michigan, and all moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

462.19. Civil liability

Sec. 19. If any common carrier shall do, or cause to be done, or permit to be done, any matter, act or thing in this

act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, or by any lawful order made under the provisions of this act by the Michigan railroad commission, such common carrier shall be liable to the person, firm or corporation injured thereby in double the amount of damages sustained in consequence of such violation: Provided, That any recovery as is in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation.

462.26 Action by common carriers to vacate commission order: pleadings, hearing, decree

Sec. 26. (a) **Grounds for action, procedure.** Any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within 30 days from the issuance of such order and notice thereof commence an action in the circuit court in chancery for the county of Ingham, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable; in which suit the commission shall be served with a subpoena and a copy of the complaint. The commission shall file its answer, and on leave of court any interested party may file an answer to said complaint. Upon the filing of the answer of the commission said action shall be at issue and stand ready for hearing upon 10 days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the said circuit court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to

the transcript of evidence offered to said commission, and the said circuit court in chancery is hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the court shall decide to be in accordance with the facts and the law;

(b) **Injunction.** No injunction shall issue suspending or staying any order of the commission, except upon application to the said circuit court in chancery or to the judge thereof, notice to the commission having been given and hearing having been had thereon;

(c) **Additional evidence; judgment.** If, upon the trial of said action, evidence shall be introduced which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for 15 days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within 10 days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order;

(d) **Appeal to supreme court.** Either party to said action, within 60 days after service of a copy of the order or

judgment of the court, may appeal to the supreme court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the supreme court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a different nature except criminal cases at the next term of the supreme court;

(e) **Burden of proof.** In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be. As amended P.A.1951, No. 129, § 1, Eff. Sept. 28.

462.38 Same; refusal to obey order; penalty

Sec. 38. Any common carrier that shall willfully neglect or refuse to obey or conform to any order of the commission made pursuant to either of sections 35 or 36[1] shall be liable to a penalty in the sum of 500 dollars, and to a like penalty for every week thereafter until such order shall have been complied with: Provided, That in cases in which an application for rehearing shall be made, or an action in court shall be begun and prosecuted in good faith and with diligence, the liability for the continuing penalty herein prescribed shall not apply or begin until after the decision of the commission or rehearing of the final order of the courts in such action.

[1] Sections 462.35, 462.36.

467.10 Suits for penalties

Sec. 10. All penalties incurred under this act, when not otherwise provided for, may be sued for in the name of the people of the state of Michigan, and if such penalty be for a

sum not exceeding 100 dollars, then such suit may be brought before a justice of the peace.

469.9 Failure of railroad or highway authorities to comply; penalty

Sec. 9. Any person or persons having jurisdiction of the railroad or highway at any crossing who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than 50 dollars or imprisonment in the county jail for not more than 30 days or both such fine and imprisonment in the discretion of the court.

469.37 Penalty; recovery

Sec. 7. It shall be the duty of every corporation and person to whom an order made by the Michigan public utilities commission under this act shall be directed, to comply with such order in accordance with its terms and for any neglect to so comply and for any violation of the provisions of this act, or for construction of any such crossing before the same shall have been authorized by the Michigan public utilities commission any such corporation or person shall be liable to a penalty of 250 dollars and to a penalty of 100 dollars for every 10 days during which such neglect shall continue or during which such crossing shall be permitted to remain in existence without the necessary approval. Any such penalty may be recovered in an action of assumpsit brought in the name of the people of this state and it shall be the duty of the prosecuting attorney of the proper county to bring any such action at the request of the Michigan public utilities commission.

469.103 Penalty; collection

Sec. 3. Any railroad corporation using or permitting to be used on its line in this state, a locomotive in violation of

any provisions of this act, shall be liable to a penalty of 100 dollars for each violation, to be recovered in a suit or suits to be brought by the prosecuting attorney in the circuit court of the county having such jurisdiction in the locality where such violation occurred. Upon duly verified information being given him of such violation, such prosecuting attorney shall bring such suits. The railroad commission shall give the proper prosecuting attorney such information of any such violations as may come to its knowledge.

APPENDIX G

transportation

David H. Brickey, Director
Harlan L. Gaddy, Assistant Director
Francis E. Ray, Secretary
Phone: (517) 482-7618

MICHIGAN LEGISLATIVE BOARD
AFL-CIO BUILDING, SUITE 102
419 S. WASHINGTON AVE.
LANSING, MICHIGAN 48933

June 6, 1986

Mr. W. S. Teszlewicz, Manager
Railroad Safety Section
Department of Transportation
Post Office Box 30050
Lansing, MI 48909

Re: Chessie System's Wyoming Yard
SCL Engines
Chicago Division

Dear Mr. Teszlewicz:

I have been advised by our members employed by the Chessie System that the *SCL engines* put into use on the Chicago Division since May 16, 1986, *are in violation of the*

Department's Rules and Regulations. Relating to Sanitation and Adequate Shelter for Certain Railroad Employees.

These *SCL engines do not have toilets*, the drinking water containers are small and ice cooled, and the paper towel dispenser is a handfull of towels crammed into the emergency air valve. Their interiors and windows are dirty.

Therefore, we request the Michigan Department of Transportation to schedule this matter for inspection, with notification to this office of the date and time it will be held. Your prompt attention in this matter will be appreciated.

Very truly yours,

/s/ DAVID H. BRICKEY

David H. Brickey, Director
Michigan State Legislative Board

DB/bk
cc: Mr. W. A. Barnes, L.R. 313

STATE OF MICHIGAN

[pu logo]

JAMES J. BLANCHARD, GOVERNOR
DEPARTMENT OF TRANSPORTATION
TRANSPORTATION BUILDING, 425 WEST OTTAWA PHONE 517-373-2090
POST OFFICE BOX 30050, LANSING, MICHIGAN 48909

JAMES P. PITZ, DIRECTOR

June 10, 1986

Employee complaint filed by United Transportation Union regarding *alleged violation* of the Department's Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees by Chessie System at its Wyoming Yard when *SCL engines are put into use that do not have toilets*, have inadequate drinking water (containers small and ice cooled) and inadequate paper towel dispenser, and the interior and windows are dirty (Chicago Subdivision)

Inspector D.G. Rackon

File No. RR-13151

NOTICE OF INSPECTION

An inspection of the captioned matter will be conducted on Wednesday, July 2, 1986, at 10:00 a.m. The parties of interest will meet at The Chesapeake and Ohio Wyoming Yard office.

This inspection is scheduled at the request of The United Transportation Union due to alleged violations of the Depart-

ment's Rules and Regulations, (R 460.1473), relating to sanitation and adequate shelter for certain railroad employees. It is requested that the *Chesapeake and Ohio Railway Company have SCL locomotives available for inspection.*

The inspector is authorized to examine and consider all surrounding conditions and circumstances deemed by him to be relevant or material to the inspection. He is not authorized to investigate any specific accident for purposes of finding the responsibility or liability involved in such accident.

All concerned are advised that recommendations at or during an inspection are subject to the review and approval of the Section management.

By copy of this letter, all known interested parties have been informed of this inspection and are requested to be present or represented.

Sincerely,

/s/ MURRAY K. LANGHAM

Murray K. Langham, Administrator
Railroad Safety and Tariffs Division
(517) 373-4882

cc: See mailing lists

MKL:sw
Mailing lists
RR- 13151

Mr. W.B. Vander Veer
Chesapeake and Ohio Railway Co.
12780 Levan Road
Livonia, MI 48154

J.R. Rymer, Manager—Engineer
Chesapeake and Ohio Railway Co.
12780 Levan Road
Livonia, MI 48154

Mr. Richard K. Pullem
Chief Engineer
Chessie System Railroad
P.O. Box 1800
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Patrick Hackett, Attorney
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1400 N. Woodward Ave., Suite 205
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Mr. David Brickey, Director
MI State Leg. Bldg., United Trans. Union
Michigan AFL-CIO Bldg., Suite 102
419 South Washington Avenue
Lansing, MI 48933

Honorable Richard Postumus
Michigan State Senator
The Capitol—District 31
Lansing, MI 48909

Honorable Jelt Sietsema
Michigan State Representative
The Capitol—District 94
Lansing, MI 48909

STATE OF MICHIGAN

[P.U. LOGO]

JAMES J. BLANCHARD, GOVERNOR
DEPARTMENT OF TRANSPORTATION
TRANSPORTATION BUILDING, 425 WEST OTTAWA PHONE 517-373-2090
POST OFFICE BOX 30050, LANSING, MICHIGAN 48909

JAMES P. PITZ, DIRECTOR

July 8, 1986

Employee Complaint filed by United Transportation Union regarding alleged violation of the Department's Rules and Regulations relating to Sanitation and Adequate Shelter for Certain Railroad Employees by Chessie System at its Wyoming Yard when SCL engines are put into use that do not have toilets, have inadequate drinking water (containers small and ice cooled) and inadequate paper towel dispenser, and the interior and windows are dirty (Chicago Subdivision)

Inspector D.G. Packer

File No. RR-13151

REPORT TRANSMITTAL

Attention is directed to the contents and recommendations provided in the enclosed report of the inspection held on July 2, 1986.

Written confirmation of compliance to the recommendations contained in the subject report shall be provided to this office.

Sincerely,

/s/ MURRAY K. LANGHAM

Murray K. Langham, Administrator
Railroad Safety and Tariffs Division
(517) 373-4882

MKL:skw

July 8, 1986

Employee Complaint filed by United Transportation Union regarding alleged violation of the Department's Rules and Regulations relating to Sanitation and Adequate Shelter for Certain Railroad Employees by Chessie System at its Wyoming Yard when SCL engines are put into use that do not have toilets, have inadequate drinking water (containers small and ice cooled) and inadequate paper towel dispenser, and the interior and windows are dirty (Chicago Subdivision)

Inspector D.G. Packer

File No. RR-13151

REPORT OF INSPECTION

THOSE PRESENT:

Walter Barnes	Local #313, United Transportation Union
Harlan L. Gaddy	Assistant State Director, United Transportation Union
William K. Meyering	General Foreman, Chesapeake and Ohio Railway Company
William A. Lakel	Assistant Supt. of Operations, Chesapeake and Ohio Railway Company
David G. Packer	Railroad Safety Inspector, Railroad Safety Section, Michigan Department of Transportation

An inspection of the captioned matter was conducted on July 2, 1986. This inspection was scheduled at the request of the United Transportation Union due to alleged violations of the Department's Rules and Regulations, (R460. 1473) relating to Sanitation and Adequate Shelter for Certain Railroad Employees.

Discussion regarding the alleged violations commenced in the office of Mr. W.A. Lakel. It was stated by Mr. Lakel that certain SCL engines that were previously in storage were recently brought into service. It is believed that the engines, which are GP-40's, were brought to the Michigan Division from Richmond, Virginia, where the regulations relating to sanitary conditions may be different than in Michigan. This information was reiterated by Mr. Meyering. It was stated that all locomotives in service are given quarterly maintenance "Q checks" as required by Federal Law.

Since the engines in question have been put into service, it has been the practice of the railroad upon the first "Q check" to install toilets, water coolers and paper towel

dispensers. Although the railroad representatives present did not have written instructions relating to this, they stated that the manager of the Mechanical Division for the Michigan Division would have these instructions.

Mr. Lakel went on to say that all of the engines in question, except in possibly rare instances when used as yard engines, are being used as trailing units and that the lead units were equipped with the proper sanitary equipment and water. After discussing the matter, no objections to the manner in which the engines were being "upgraded" was apparent.

The inspecting party then proceeded to the Wyoming Yard Diesel House to inspect the SCL engine in question (SCL # 6667); review of the engine showed that it had been in for quarterly maintenance on June 20, 1986. The unit appeared to be in reasonably clean condition and was equipped with a new toilet, electric compact refrigerator with water, paper cup dispenser, and paper towel holder. (The railroad representative stated that their observation of other SCL engines which had been in for "Q checks" were similarly equipped. All of those present were satisfied with the improvements and current condition of the engine inspected).

It was understood by all present that from time to time engines may be brought to Michigan without the proper sanitation equipment. Considering that those unequipped engines would be used only as trailing units, or on occasion in yards where sanitary facilities are readily available, no further objection was heard.

Therefore the following recommendations are made and The Chesapeake and Ohio Railway Company shall:

—Upon the first quarterly maintenance of any engine being used in Michigan, equip same with the proper toilet facilities and equipment as specified in the Department's Rules and Regulations (those conditions being found in SCL Unit 6667 acceptable);

—Provide a copy of its written instructions pertaining to the installation of the necessary facilities and equipment to this office within 30 days;

—Provide to this office a written statement as to an anticipated completion date of work on all engines being used in Michigan;

—In the interim, issue instructions to its employees limiting the use of any engine not properly equipped to trailing units only in a yard where toilet facilities are available. Provide a water cooler with cool water and drinking cups on same. Send copy of bulletin to this office.

Respectfully Submitted,

By: /s/ DAVID G. PACKER

David G. Packer, Railroad
Safety Inspector
Railroad Safety Section

cc: See mailing list
DGP: skw

Mailing list
RR-13151

Chesapeake and Ohio Railway Company
12780 Levan Road
Livonia, MI 48154

—Mr. W. B. VanderVeer
—Mr. J. R. Rymer, Mgr.-Engr.
—Mr. R. W. Meseke, Mgr., Mechanical Dept.

Mr. Richard K. Pullem
Chief Engineer
Chessie System Railroad
P.O. Box 1800
Huntington, WV 25718

Mr. Patrick Hackett, Attorney
Frasco, Hackett, & Mills
1100 North Woodward Avenue, Suite 205
Bloomfield Hills, Michigan 48013

Mr. David Brickey, Director
MI State Leg. Bldg., United Trans. Union
Michigan AFL-CIO-Bldg., Suite 102
119 South Washington Avenue
Lansing, Michigan 48933

Honorable Richard Postumus
Michigan State Senator
The Capitol-District 31
Lansing, Michigan 48909

Honorable Jelt Sietsema
Michigan State Representative
The Capitol-District 94
Lansing, Michigan 48909

STATE OF MICHIGAN
DEPARTMENT OF TRANSPORTATION
OFFICE OF ADMINISTRATIVE LAW HEARINGS

In the matter of complaint by the United Transportation Union and the Brotherhood of Locomotive Engineers of *violation of Michigan Department of Transportation Rule No. R 460.1473(a) by absence of toilets as sanitary facilities* on CSX Transportation, Inc. locomotives used in Michigan

RR-13204
RR-13151

NOTICE OF HEARING

The United Transportation Union and the Brotherhood of Locomotive Engineers, *nationally recognized railroad labor organizations*, have filed complaints with the Railroad Safety and Tariffs Division of the Michigan Department of Transportation *alleging that certain locomotives of CSX Transportation, Inc., as used in Michigan, lack toilet facilities as are required by Department Rule R 460.1473(a).* The rule provides:

"Rule 460.1473 Sec. 3—Running Facilities

(a) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition."

The complaints have not been denied and CSX Transportation, Inc., following meetings with the complainants and division staff, provided a general plan for elimination of the sanitary deficiencies by installation of toilets on individual locomotives during the quarterly mechanical repair periods.

After consideration, the complainants found the plan unsatisfactory by reason of the lack of a firm and clear commitment for performance and requested further consideration of this matter by an administrative hearing.

Therefore, this is due notice that an administrative hearing in this matter will be held on Wednesday, February 10, 1988, at 10:00 a.m., in the Hearing Room located on the fourth floor of the Michigan Department of Transportation Building, 425 West Ottawa Street, Lansing, Michigan.

Parties wishing to participate in the presentation of testimony or exhibits or in the examination of witnesses should be represented by counsel. The staff will be represented by Charles Schettler, Jr., Assistant Attorney General. Counsel for parties involved or wishing to participate should file their appearance within twenty (20) days of service of this Notice to the Office of Administrative Law Hearings, with a copy to the Assistant Attorney General, in this matter, Charles Schettler, Jr. The addresses are as follows:

Office of Administrative Law Hearings
Virginia A. Dean, Administrative Law Judge
Michigan Department of Transportation
P.O. Box 30050
Lansing, Michigan 48909

Charles Schettler, Jr.
Assistant Attorney General
Fourth Floor, Transportation Building
425 West Ottawa
Lansing, Michigan 48909

The hearing will be conducted in accordance with the provisions of the Michigan Department of Transportation Rules of Practice and Procedure, 1979 Administrative Code R 460.11-R 460.99, transferred pursuant to Executive Order 1975-10, to 1969 PA 306 Ch 4, MCL 24.277 *et al;* MSA 3.560(177) *et al* to 1909 PA 283 Sec. 27, MCL 221.27; MSA 9.28 to 1873 PA 198 A4 Sec. 2, 3, 4, MCL 466.2-466.4;

MSA 22.261-22.263 to 1921 PA 270, MCL 469.1 *et al*; MSA 22.761 *et al* to 1909 PA 300 Sec. 22, MCL 462.22; MSA 22.41 to 1978 PA 483 and 484, MCL 16.450 *et al*; MSA 3.29(350) *et al*, MCL 247.801; MSA 9.216 (1), and MCL 247.822; MSA 9.216(102).

Pursuant to Department Rule No. 11 (R460.21), a person claiming an interest in this proceeding may Petition for Leave to Intervene therein, and an original and six (6) copies of the Petition shall be filed with the Department at least five (5) days prior to the date set for hearing, and when filed the Petition shall be accompanied by a Proof of Service showing service of the Petition upon all parties to the proceeding. If not timely filed, the Petition shall not be granted unless it can be shown that denial thereof would be detrimental to the public interest or would be apt to cause a miscarriage of justice. All parties except intervenors shall have adequate opportunity to file answers to the Petition and to be heard relative thereto.

Pursuant to Rule No. 16 (R460.26), a person or party may make a statement at a public hearing without filing a Petition to Intervene providing there is a full disclosure of the person making the statement and of the interest of that person or party in the proceeding, together with a statement of position such person or party intends taking and that the contentions thereof shall be reasonably pertinent to the issue(s) presented for hearing. An original and six (6) copies of an Appearance, setting forth such disclosures, shall be filed at least five (5) days prior to the date of hearing and shall be accompanied by a Proof of Service as set forth above for Department Rule No. 11 (R460.21).

Changes in the time and place of the scheduled hearing shall be granted only for good cause shown on stipulation of the parties to the matter. Notices of Adjournment or notices of change in the time or place of hearing will be made only

to the parties to the proceeding and to the persons or parties having filed an Appearance or a Petition for Leave to Intervene, as set forth hereinabove.

/s/ VIRGINIA A. DEAN
Administrative Law Judge

Dated: January 4, 1988

STATE OF MICHIGAN
DEPARTMENT OF TRANSPORTATION
OFFICE OF ADMINISTRATIVE LAW HEARINGS
425 WEST OTTAWA STREET
LANSING, MICHIGAN 48909
(517) 373-4881

In the matter of complaint by the United Transportation Union and the Brotherhood of Locomotive Engineers of violation of Michigan Department of Transportation Rule No. R 460.1473(a) by absence of toilets as sanitary facilities on CSX Transportation, Inc. locomotives used in Michigan

RR-13204
RR-13151

STATE OF MICHIGAN
COUNTY OF INGHAM } ss.:

PROOF OF SERVICE

Judith Grabek, being first duly sworn, deposes and says that on January 4, 1988, she served a true copy of the attached Notice of Hearing, in the above-entitled matter by personal service or deposited the same in the United States mail in the city of Lansing, Michigan, enclosed in envelopes bearing postage, fully prepaid, plainly addressed as follows:

William A. Ralls, Esq.
Ralls & Mackey, P.C.
118 West Ottawa Street
Lansing, Michigan 48933

David Brickey, Director
State Legislative Board
United Transportation Union
419 South Washington Avenue
Lansing, Michigan 48933

Thomas R. Beenan, General Chairman
Brotherhood of Locomotive Engineers
1645 Webster St., NW
Grand Rapids, Michigan 49504

Patrick E. Hackett, Esq.
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Sally Kircher, Esq.
General Attorney
CSX Transportation, Inc., Law Department
500 Water Street
Jacksonville, Florida 32202

Charles Schettler, Jr.
Assistant Attorney General
Transportation Building, 4th Floor
Lansing, Michigan 48909

/s/ JUDITH GRABEK

Subscribed and sworn to before me
this 4th day of January, 1988.

/s/ VIRGINIA A. DEAN

Notary Public,
Ingham County, Michigan
My commission expires
August 19, 1990.

STATE OF MICHIGAN
DEPARTMENT OF TRANSPORTATION
OFFICE OF ADMINISTRATIVE LAW HEARINGS

In the matter of complaint by the United Transportation Union and the Brotherhood of Locomotive Engineers of violation of Michigan Department of Transportation Rule No. R 460.1473(a) by absence of toilets as sanitary facilities on CSX Transportation, Inc. locomotives used in Michigan

RR-13204
RR-13151

ORDER

CSX Transportation, Inc. (CSXT) made a Motion To Stay Administrative Proceedings on January 21, 1988, and the United Transportation Union (UTU) responded to CSXT's Motion to Stay Administrative Proceedings and Memorandum Opposing Motion To Stay Administrative Proceedings dated January 26, 1988. Oral Argument on the Motion was scheduled for 10:00 a.m., Wednesday, January 27, 1988, in the Hearing Room, Fourth Floor, Transportation Building, 425 West Ottawa Street, Lansing, Michigan.

An agency charged with implementation of a statutory framework ordinarily has no authority to deviate from or abdicate its statutory responsibility, United States v City of Detroit, (U.S.C.A. 6th, 1983), 720 F2d 443. Likewise, administrative boards do not consider constitutional questions, Golembiewski v City of Madison Heights Civil Service Commission, 93 Mich App 143, 286 NW2d 69 (1979). Yet this is what CSXT requests in its Motion to Stay Proceedings.

Rule 460.1473 is specific and to the point, and since it promotes the health, safety and welfare of the citizens of

this state, its passage and enforcement are well within the police powers of the State of Michigan.

CSXT argues that Federal law preempts state enforcement of all rules and regulations attempting to regulate the railroad industry in this state. It cites to various portions of the Federal Boiler Inspection Act and to sections of the Federal Railroad Safety Act. None of the cited sections deal specifically with the question of sanitary facilities. Rather, CSXT asks that this tribunal interpret those acts in a manner as to bring the instant action within its confines. Such is not only outside the jurisdiction of this tribunal, but, in the opinion of this tribunal, contrary to 45 U.S.C.A., Sec. 434 as well. The specific rule involved in this action does not relate to the mechanical operation of a locomotive nor to any appurtenances, but to sanitary facilities normally available to travelers and not available along the route taken by railroads. This tribunal is unwilling to presume that Federal statutes and rules cited by CSXT were intended to prohibit state regulation in an area so basic to public health.

For the above reasons, CSXT's Motion To Stay Administrative Proceedings is DENIED.

/s/ VIRGINIA A. DEAN
Administrative Law Judge

Dated: January 27, 1988

APPENDIX H

NOS. 88-1629/1642

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC.,
Plaintiff-Appellee

vs.

JAMES J. PITZ, *et al.*,
Defendants (88-1629)
Defendants-Appellants (88-1642)

UNITED TRANSPORTATION UNION,
Defendant-Appellant (88-1629)
Intervening Defendant (88-1642)

ORDER

Upon consideration of the motions of the appellee to stay the mandate, construed in 88-1629 as a motion to recall the mandate and stay reissuance thereof, and the response of the appellants in opposition thereto,

It is ORDERED that the motions be, and they hereby are, granted.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN

(2)

Supreme Court, U.S.
FILED
FEB 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1227
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1989

CSXT, INC.,

Petitioner,

v.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN
and
UNITED TRANSPORTATION UNION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

FRANK J. KELLEY
Attorney General

LOUIS J. CARUSO
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70 pp

QUESTION PRESENTED

Where the State has initiated proceedings against a railroad company to enforce the State's rule requiring that adequate toilet facilities be made available for rail workers, is Younger abstention appropriate in the federal court action subsequently filed by the railroad to enjoin the State's proceedings on preemption grounds?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petition omits reference to the following provisions of Michigan law necessary for consideration of the judicial nature of MDOT's proceeding:

1. Article VI, § 28 of the Michigan Constitution of 1963 provides, in relevant part:

> "All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law."

2. Chapter 4 of the Michigan Administrative Procedures Act of 1969 is

set forth verbatim in Respondents' Appendix. MICH. COMP. LAWS ANN. §§ 24.271-24.282, 24.285-24.287 (1981).

STATEMENT OF THE CASE

On January 4, 1988 Respondent Michigan Department of Transportation's (MDOT) Office of Administrative Law Hearings issued its Notice of Hearing on complaints made against Petitioner CSXT, Inc. (CSXT) filed with MDOT's Railroad Safety & Tariffs Division (Railroad Safety Division) by Respondent United Transportation Union. (Petition, Appendix G-12). The complaints alleged that CSXT failed to make toilet facilities available to its rail workers on a number of its trains operating in Michigan, contrary to Rule 460.1473(a) (Michigan's Rule) which provides:

> "Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." MICH. ADMIN. CODE R. 460.1473 (1979).

The hearing was to have been conducted in accordance with chapter 4 of Michigan's Administrative Procedures Act relating to "contested cases". (Petition, Appendix G-13).

Thereafter, CSXT filed suit in the federal district court seeking to enjoin the State's administrative proceedings on the ground that Michigan's Rule was preempted by the Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. §§ 22-43 (1986) and the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. §§ 421-44 (1986). CSXT also brought a motion before MDOT's Administrative Law Judge to stay the State's administrative proceedings pending resolution of the federal district court action, which motion was denied. In denying CSXT's

motion, the Administrative Law Judge noted that the Rule promoted the health, safety, and welfare of the citizens of the State and was well within the State's police power. The Administrative Law Judge was also unwilling to presume that the federal laws relied on by CSXT were intended to prohibit state regulation in an area "so basic to public health." (Petition, Appendix G-18-G-19).

The State's administrative proceedings progressed no further, however, having been preliminarily enjoined by the federal district court until such time as the court ruled on CSXT's motion for summary judgment. Prior to the date set for hearing on the motion, the district court issued its opinion and order granting CSXT's motion, declaring Michigan's Rule

preempted by both the Locomotive Boiler Inspection Act and the Federal Railroad Safety Act and permanently enjoining further enforcement of the Rule insofar as it required commodes on locomotives operating in Michigan. (Petition, Appendix D).

MDOT and Intervenor-UTU appealed to the Sixth Circuit Court of Appeals, which ruled that the district court should have abstained from interfering with the ongoing railroad safety proceeding in the Michigan Department of Transportation pursuant to the judicially-crafted rule announced in Younger v Harris, 401 U.S. 37 (1971). (Petition, Appendix B-12). In so ruling, the Sixth Circuit found that the State's proceedings were judicial in nature, implicated important

state interests in preventing pollution and disease and afforded an adequate opportunity for review of constitutional challenges. (Petition, Appendix B-9-B-12).

CSXT moved for a Stay of Mandate, which motion was granted, and filed its Petition for Writ of Certiorari with this Court. Thus, no hearing has yet been held before MDOT's Administrative Law Judge, nor has the Administrative Law Judge yet had an opportunity to issue a definitive order or ruling interpreting and enforcing Michigan's Rule.

SUMMARY OF REASONS FOR DENYING PETITION

Now before this Court is an abstention case in which the Sixth Circuit carefully and correctly applied both

Michigan law and the rulings of this Court. Having determined that Younger abstention was appropriate on the unique facts of this case, the Sixth Circuit did not address the merits of Petitioner's preemption claims. Accordingly, no conflict of decisions is presented by this case and no further review by this Court is warranted.

Nor does this case raise an important question of federal law in need of resolution by this Court. At issue is whether abstention is appropriate in the face of a preemption challenge, a question already resolved by this Court in the affirmative. Contrary to Petitioner's assertion, the unique facts of this case do not raise the issue of a facially conclusive preemption challenge

to foreclosed state regulation of locomotives. Nowhere on the face of the rule at issue in this case is the regulation of locomotives conclusively established; indeed, Michigan's rule expressly states that adequate toilet facilities "shall be made available for trainmen, enginemen and yardmen" without any reference to "locomotives" whatsoever.

No conflict of decisions is presented by this case and no important question of federal law is raised. Accordingly, the petition should be denied.

ARGUMENT

I

THE SIXTH CIRCUIT RENDERED A DECISION ON ABSTENTION, NOT ON PREEMPTION. ITS DECISION THAT YOUNGER ABSTENTION WAS APPROPRIATE UNDER THE PARTICULAR FACTS OF THIS CASE WAS ENTIRELY CONSISTENT WITH, AND INDEED MANDATED BY, THE APPLICABLE DECISIONS OF THIS COURT AND THERE IS NO CONFLICT OF DECISIONS WARRANTING REVIEW BY THIS COURT.

Petitioner attempts to characterize the Sixth Circuit's opinion as a preemption case in which the Court held that the LBIA and the FRSA permit state regulation of locomotives, then sets out to prove that these "holdings" are in conflict with the preemption decisions of this Court and other federal appeals courts construing these acts. The Sixth Circuit, however, rendered no such "holdings". Rather, the Sixth Circuit held that the abstention standards arti-

culated by this Court in a series of cases were clearly met on the facts of this case. The Sixth Circuit's abstention holding is entirely consistent with, and indeed mandated by, the decisions of this Court beginning with Younger v Harris, 401 U.S. 37 (1971), and continuing through Middlesex County Ethics Committee v Garden State Bar Ass'n, 457 U.S. 423 (1982), to Ohio Civil Rights Commission v Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and finally to this Court's most recent pronouncement in New Orleans Public Service, Inc. v Council of City of New Orleans (NOPSI), 491 U.S. ____, 109 S. Ct. 2506 (1989). There is no conflict of decisions for this Court to review and no error for this Court to correct.

A. The Sixth Circuit's Abstention Ruling Was Correct.

Specifically, the Sixth Circuit's ruling that Younger abstention was appropriate on the facts of this case was based on sound reasoning. Noting that CSXT's challenge to the State's enforcement proceedings was based on federal preemption, the Sixth Circuit proceeded to consideration of whether the nature of CSXT's challenge warranted deviation from traditional abstention analysis. In holding that abstention cases involving preemption should not be treated differently than other abstention cases, the Sixth Circuit followed this Court's recent ruling in the NOPSI case, supra, where the question was laid to rest:

> "[O]ne of the issues in the present case is whether the principle of Younger can properly be extended to this type of suit. NOPSI argues that

> Younger does not require abstention in the face of a substantial claim that the challenged state action is completely pre-empted by federal law. ... We disagree."
> 883 F.2d at 472 n. 4 quoting NOPSI, 491 U.S. at ____, 109 S. Ct. at 2516 (See Petition, Appendix B-5).

The Sixth Circuit then correctly identified the applicable criteria that must be met in determining whether abstention is appropriate, as set forth in Middlesex County, supra, as follows:

> "[F]irst, do [the relevant state proceedings] ... constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges."
> 883 F.2d at 474 quoting Middlesex, 457 U.S. at 432, 102 S. Ct. at 2521 (See Petition, Appendix B-9).

The Sixth Circuit found that all three criteria were met on the facts of

this case.[1] Specifically, the Sixth Circuit found that an adequate opportunity was afforded CSXT to raise its preemption challenge in the state proceedings, because Michigan's Administrative Procedures Act provides for full judicial review of such questions. 883 F.2d at 474-475 (See Petition, Appendix E-10-B-11). As to the importance of the State's interest in pursuing its enforcement proceedings, the Sixth Circuit ruled that preventing the risk of pollution and disease is one of the preeminent functions of the State's police power to protect the health and safety of its residents. 883 F.2d at 475 (See Petition, Appendix B-11-B-12).

---

[1]Of these three criteria, Petitioner disputes only the Sixth Circuit's finding with regard to the judicial nature of MDOT's proceeding. See Argument III, infra.

And finally, as discussed more fully under Argument III, infra, the Sixth Circuit also ruled, with regard to the first of the Middlesex criteria, that the State's proceedings constituted an ongoing state judicial proceeding under the NOPSI rationale recently articulated by this Court. On this point, the Sixth Circuit noted NOPSI's instruction that an agency's proceeding should be characterized as legislative or judicial depending on the nature of the "final act" the proceeding is designed to produce. 883 F.2d at 474 (See Petition, Appendix B-10). As MDOT's proceeding was designed to facilitate the interpretation and application of the State's rule requiring "adequate toilet facilities" as well as a determination whether CSXT was liable for a violation of the rule, the

Sixth Circuit correctly determined that MDOT's proceeding was judicial in nature. 883 F.2d at 474 (See Petition, Appendix B-10). This conclusion is consistent with, and indeed mandated by, NOPSI, and is fully supported by Michigan's Constitution and applicable statutes. (See Argument III, infra).

B. The Sixth Circuit's Abstention Ruling Did Not Purport To Reach The Merits Of Petitioner's Preemption Claim And Is Not At Odds With Decisions Of This Court On Preemption.

As shown above, it simply cannot be disputed that, in ruling abstention was appropriate on the facts of this case, the Sixth Circuit adhered strictly to all applicable precedents of this Court relating to abstention. In its first two arguments, however, CSXT attempts to

characterize the Sixth Circuit's opinion as having reached and ruled upon the merits of CSXT's preemption claims in a manner that conflicts with decisions of this Court and other federal appeals courts. For several reasons, CSXT's position is simply not supportable.

First, the Sixth Circuit did not rule on the merits of CSXT's preemption claims; its focus was plainly limited to the abstention argument presented:

> "This appeal requires us to answer two questions. First, does the fact that this case raises preemption rather than other types of constitutional issues require us to modify the classic abstention analysis? And second, once the proper mode of analysis is determined, does it require abstention in this case?"
> 883 F.2d at 471 (See Petition, Appendix B-3-B-4).

As revealed by the above passage, to the extent the Sixth Circuit discussed

preemption, that discussion was designed to identify the type of constitutional challenge CSXT was raising to the State's proceedings for abstention analysis purposes, not to pass on the underlying merits of the preemption challenge.

Nor is CSXT's characterization to the contrary supported anywhere else in the text of the Sixth Circuit's opinion. None of the Sixth Circuit's remarks relating to the LBIA and FRSA are essential to the Court's determination on abstention. As such, the remarks constitute obiter dictum and lack the force of an adjudication warranting review by this Court.

Even more importantly, however, the Sixth Circuit's dicta are fully supportable in federal statutory and case

authority and do not conflict with decisions of this Court or other federal appeals courts. Petitioner claims the Sixth Circuit ruled that neither the LBIA nor the FRSA preempts states from regulating locomotives. The statements made by the Court relied upon by Petitioner to support this characterization are: 1) that the LBIA "'lists certain equipment required for locomotives and railroad cars ... does not prohibit concurrent state regulation or purport to occupy the field of railroad [regulation]'"; and 2) that the FRSA allows the Secretary of Transportation to "'prescribe appropriate rules for all areas of railroad safety,' including rules concerning equipment and operating procedures. The act allows limited concurrent state regulation." (Petition,

pp 6, 9) (citations omitted) (emphasis supplied).

One need only read these statements relied upon by Petitioner to conclude that CSXT's reliance is misplaced. These statements themselves refer broadly to railroad regulation, not narrowly to locomotive regulation. Yet all the cases cited by Petitioner as conflicting with the Sixth Circuit's opinion, including Napier v Atlantic Coast Line R. Co., 272 U.S. 605 (1926), narrowly address locomotive regulation. These cases are not applicable and cannot serve to support the conflict urged by Petitioner.

On the other hand, the Sixth Circuit's statements relating generally to state railroad regulation are fully supportable. The Sixth Circuit is

correct in its assertion that the LBIA does not prohibit all state railroad regulation. By its terms, the LBIA relates only to the locomotive. 45 U.S.C. §§ 22-23. The LBIA does not, for example, preclude state regulation of the caboose. Missouri Pacific Railroad Company v Railroad Commission of Texas, 833 F.2d 570, 576 (5th Cir., 1987). Similarly, by its terms, the FRSA permits state regulation of railroads except where a federal rule or standard covers the subject matter of the state requirement. 45 U.S.C. § 434.

The Sixth Circuit's abstention ruling is correct and should not be considered by this Court.

II

THERE IS NO FACIALLY CONCLUSIVE PREEMPTION CLAIM PRESENT IN THIS CASE. THE SIXTH CIRCUIT'S OPINION REPRESENTS A RELATIVELY ROUTINE APPLICATION OF ESTABLISHED ABSTENTION DOCTRINE AND DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT.

In June of 1989, this Court decided NOPSI where, as stated above, this Court ruled that Younger required abstention even in the face of a substantial claim that the challenged State action is completely preempted by federal law. NOPSI, 491 U.S. at ____, 109 S. Ct. at 2516. Also in NOPSI, however, Justice Scalia, writing for the majority, offered the following speculation about the sufficiency of a facially conclusive preemption claim to render abstention inappropriate:

> "Thus, NOPSI argues, even if a substantial claim of federal pre-

> emption is not sufficient to render abstention inappropriate, at least a facially conclusive claim is. Perhaps so. But we do not have to decide the matter here, since the proceeding and order at issue do not meet that description."
> NOPSI, 491 U.S. at ___, 109 S. Ct. at 2517.

While the order and proceeding in NOPSI did not present a facially conclusive preemption question, Petitioner argues that this case does. This is simply not so for a number of reasons.

First, according to Petitioner, its claim of preemption is facially conclusive because the "[r]egulation of locomotive equipment is directly foreclosed by the LBIA, the FRSA, the regulations supplementing those statutes, and the case law applying them" and "MDOT has sought directly to regulate equipment on CSXT locomotives... ." (Petition, p 12).

As was seen in its attempt to characterize the Sixth Circuit's ruling as relating to preemption and locomotives, however, here too CSXT is attempting to force a focus on locomotives that is not supported on the facts of this case.

Most telling in this regard is the fact that, in its argument on this point, Petitioner has failed to make a single reference to the one authority of greatest relevance to it -- Michigan's Rule. The Rule which the Railroad Safety Division seeks to enforce against CSXT states in relevant part:

> "Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." MICH. ADMIN. CODE R. 460.1473 (1979).

On its face, the Rule requires "adequate toilet facilities." On its

face, the Rule requires that those adequate toilet facilities "be made available" for trainmen, enginemen, and yardmen. On its face, the Rule requires that those toilet facilities "be kept in a reasonably clean and sanitary condition." Nowhere on its face, however, does the Rule require that toilets be installed on locomotives. Accordingly, Petitioner's contention that this case presents a facially conclusive preemption challenge is without support in the record of this case and should not be reviewed by this Court.

Instead of focusing on the Rule itself, Petitioner contends that the "undisputed actions of MDOT enforcing the Rule" should suffice to render Petitioner's claim of preemption facially

conclusive. (Petition, p 15, n. 3). CSXT has failed to identify specifically what those "undisputed actions" are, however, making direct response somewhat more difficult. Nevertheless, it is presumed that Petitioner is referring to the positions taken by the personnel in MDOT's Railroad Safety Division and representatives of the United Transportation Union in correspondence, and through the initial inspection process and other pre-hearing activities, and by counsel for the Railroad Safety Division in related federal court proceedings to the effect that Michigan's Rule should be construed to require toilets on locomotives. Indeed, had the scheduled proceedings before the Administrative Law Judge gone forward, one of the interpretations of Michigan's

Rule counsel for the Railroad Safety Division had planned to urge the Administrative Law Judge to adopt was that the Rule required CSXT to make toilets available on locomotives.

Never has it been suggested, however, by CSXT or by anyone else, that any of these actions or statements represented MDOT's final and authoritative construction of the Rule. It has never been questioned that only one individual in MDOT has been delegated the authority to construe and definitively apply MDOT's Rule. That individual is not an employee of the Railroad Safety Division or a representative of the United Transportation Union and is not counsel for the Railroad Safety Division. The sole person delegated the authority to

interpret and apply MDOT's Rule is MDOT's Administrative Law Judge "after hearing thereon."

Moreover, it is important to recall that the Administrative Law Judge before whom the State's enforcement action was to have proceeded never heard the State's case or the case of any other of the parties, because all state proceedings were enjoined by order of the district court and subsequent stays pending appeal. Thus, no authoritative interpretation or construction of Michigan's Rule has yet been rendered at the state level and accordingly it cannot be known at this time whether the Administrative Law Judge's ruling would have resulted in regulation of locomotives at all. For example, the Administrative Law Judge may

well have construed MDOT's Rule to require CSXT to make toilets available on CSXT's cabooses or along the tracks on scheduled stops and off the train entirely.

As shown above, the unique facts of this case do not present the facially conclusive preemption claim alluded to by Justice Scalia in NOPSI sufficient to render inapplicable all the principles respecting comity on which abstention doctrine is based. The Rule at issue in this case does not even refer to locomotives and no authoritative agency construction of the Rule is available to examine. The Sixth Circuit correctly applied NOPSI and no further review is warranted by this Court.

III

THE SIXTH CIRCUIT'S DECISION THAT MDOT'S ADMINISTRATIVE PROCEEDING WAS JUDICIAL IN NATURE IS BOTH CONSISTENT WITH MICHIGAN LAW AND COMPELLED BY THIS COURT'S RECENT RULING IN NOPSI.

In it's final argument, Petitioner claims that the Sixth Circuit erred in ruling that MDOT's enjoined administrative proceeding is judicial in nature because Michigan's Constitution forbids the exercise of judicial powers by MDOT. In support of its contention, CSXT relies on article III, section 2 of Michigan's Constitution in which separate powers are established for the executive, legislative, and judicial branches of government. (Petition, p 17). In addition, Petitioner cites cases of the Michigan Supreme Court decided in 1919 and 1933 for the general proposition that the

constitutional prohibition of article III, section 2 prevents administrative agencies from exercising purely judicial functions. (Petition, pp 16-17). For at least three reasons, Petitioner's argument is without merit and should not be reviewed by this Court.

First, Petitioner misapprehends the NOPSI ruling. The focus of the NOPSI rationale was not on whether an administrative agency exercises judicial or legislative power, but rather on whether the particular administrative proceeding at issue was judicial or legislative in nature. As correctly stated by the Sixth Circuit in its discussion of NOPSI, the inquiry should focus on the "nature of the final act" the proceeding is designed to produce. 883 F.2d at 474 (See

Petition, Appendix B-10). A proceeding which "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," is judicial. 883 F.2d at 474, citing NOPSI (See Petition, Appendix B-10).

Nor does NOPSI stand as the lone decision of this Court counselling such an approach. In Gibson v Berryhill, 411 U.S. 564, 576-577 (1979), this Court made clear that state administrative proceedings may "command the respect due court proceedings" such as where they look to the revocation of a medical license. In Middlesex County Ethics Committee v Garden State Bar Ass'n, supra, 457 U.S. at 432-434, this Court held that federal courts should not

enjoin state lawyer disciplinary proceedings intitiated by state ethics committees, finding that such proceedings were "judicial in nature". And in Ohio Civil Rights Commission v Dayton Christian Schools, Inc., 477 U.S. 619, 627-628 (1986), this Court ruled that the federal court should have abstained from hearing a civil rights action brought by a religious school seeking to enjoin the Ohio Civil Rights Commission from continuing its administrative proceedings against the school for violations of Ohio's employment laws relating to discrimination and retaliatory discharge. In Dayton Christian Schools, as in all of the above cases, the Court looked to whether the administrative proceeding was "judicial in nature", not to whether the agency was exercising strictly judicial

power.[2]

Second, Petitioner's argument is premised on article III, section 2 of the Michigan Constitution, which, according to Petitioner, forbids the exercise of judicial power by administrative agencies in the State of Michigan. Petitioner has failed to cite to this Court, however, a more directly applicable article of Michigan's Constitution, article VI, section 28, which provides in relevant part as follows:

> "All final decisions, findings, rulings and orders of any administra-

[2]The heading to Petitioner's fourth argument states that the Sixth Circuit's decision is "in conflict with applicable decisions of this Court. ..." (Petition, p 16). Respondent is unable to identify within the body of Petitioner's argument, however, reference to any such conflicting case. Accordingly, Respondent's argument addresses only the asserted conflict with Michigan authorities.

> tive officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. ..." MICH. CONST. art. VI, § 28 (emphasis added).

The Convention Comment to article VI, section 28 of Michigan's 1963 Constitution explains:

> "This is a new section recognizing the increased significance assumed by administrative law in the legal system of the state in recent years. It provides that decisions, findings, rulings and orders of administrative officers or agencies which [a]ffect private rights be subject to judicial review." Comment to MICH. CONST. art. VI, § 28 (emphasis added).

The 1919 and 1933 cases relied upon by Petitioner are relevant to Michigan's

then effective 1908 Constitution, but are not applicable to Michigan's current Constitution. Unlike its predecessors, Michigan's 1963 Constitution recognizes the "increased significance assumed by administrative law in the legal system of the state." Id.

And finally, not only does Michigan's Constitution fully support the Sixth Circuit's finding that MDOT's proceedings are judicial in nature, Michigan's statutory provisions are equally supportive. Petitioner has failed to cite this Court to the most comprehensive and directly applicable of Michigan's statutes, the Michigan Administrative Procedures Act of 1969 (MAPA), pursuant to which MDOT's proceedings were scheduled to be heard. MICH. COMP. LAWS §§ 24.271-24.282,

24.285-24.287 (1981), (MICH. STAT. ANN. §§ 3.560(171)-3.560(182), 3.560(185-3.560(187) (Callaghan 1985)). A review of chapter 4 of the MAPA reveals beyond question the "judicial nature" of MDOT's proceeding. (Appendix 1a-24a).

Specifically, the MAPA provides that the parties to a contested case must receive notice of a hearing and an opportunity to present evidence and argument. (MAPA, § 72, Appendix 3a-4a). Cross-examination of witnesses is permitted as is presentation of rebuttal evidence. (MAPA, § 72, Appendix 3a-4a). Authorized agencies may issue subpoenas and oaths may be administered. (MAPA, § 74, Appendix 5a-7a). The rules of evidence are applied as far as practicable and only evidence made a part of the record

may be considered in a determination of the case. (MAPA, §§ 75, 76, Appendix 7a-9a). Final decisions or orders must be made in writing or on the record and must include findings of fact and conclusions of law. (MAPA, § 85, Appendix 20a). The decision or order is then subject to review in the courts as provided by law. These provisions confirm that Michigan's administrative hearings are quintessentially "judicial in nature."

In light of the above authorities, the Sixth Circuit's decision that MDOT's proceeding is judicial in nature is sound under Michigan law and should not be reviewed by this Court.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Respondent respectfully submits that this Court should deny the petition for writ of certiorari.

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RESPONDENTS' APPENDIX

CHAPTER 4.
PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of

the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and

an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the produc-

tion of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to

a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to

disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege

recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under

section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which

pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278 Stipulations; disposition of cases, methods.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated an authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial matter. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of

the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined.

Sec. 80. (1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and

the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows

that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the

legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested

case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

24.281 Proposals for decision; contents.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, pre-

pared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by

law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency

employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285 Final decisions and orders.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language,

shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

24.287 Rehearings.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this

act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

NO. 89-1227 (3)

Supreme Court, U.S.
FILED
FEB 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSXT, INC.,
Petitioner,

vs.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN

and

UNITED TRANSPORTATION UNION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent United Transportation Union's Brief in Opposition

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Whether a Michigan Department of Transportation (MDOT) Rule requiring "adequate toilet facilities be made available", but which does not require toilets on locomotives textually or by agency or state court construction, provides the basis for a facially conclusive preemption challenge under the Locomotive Boiler Inspection Act, 45 USC 22 et seq. (LBIA), which only regulates locomotives and not the entire consist.

II.

Whether a State Rule requiring "adequate toilet facilities be made available" is facially preempted by the Federal Railroad Safety Act (FRSA) where the Secretary of Transportation has not prescribed rules directly governing locomotive toilets and the FRSA expressly allows states to adopt or continue in force any rule related to railroad safety until the Secretary has adopted a rule covering the subject matter.

III.

Whether this Court should use this case to determine if a facially conclusive preemption claim renders abstention inappropriate where CSXT does not have a facial claim of federal preemption, where the Court below did not directly address the question and where other lower courts have not directly addressed this issue, leaving this Court without the benefit of lower court decisions.

IV.

Whether the State administrative hearing at issue should be considered "judicial" in nature for purposes of *Younger* abstention where the hearing was to be held in accordance with Chapter 4 of the Michigan Administrative Procedures Act which provides, inter alia, for representation by counsel, the filing of pleadings, subpoenaing of witnesses and documents, direct and cross examination of witnesses, a decision by a neutral administrative law judge and judicial review in the state court system.

V.

Whether the Court should grant certiorari to a case which would require it to determine the merits of two arguments raised by UTU below which were not addressed by the Court of Appeals, i.e. (1) CSXT's claim should be dismissed because it failed to exhaust its administrative remedies, and (2) the District Court failed to seek a construction of the Rule which would avoid the constitutional challenge but instead impermissibly rendered an advisory opinion and improperly enjoined one possible construction.

LIST OF PARTIES AND RULE 28.1 LIST

The parties before the Court of Appeals and this Court are all listed in the caption.

United Transportation Union has the following parent companies, subsidiaries and affiliates: NONE

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No. 89-1227

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSXT, INC.,
Petitioner,

vs.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN

and

UNITED TRANSPORTATION UNION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent United Transportation Union (UTU) respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case.

OPINIONS BELOW

Contrary to the representation of CSXT, the opinion of the Court of Appeals is reported, see 883 F.2d 468 (Appendix B). The opinion of the District Court is reported at 669 F. Supp 127 (Appendix D).

JURISDICTION

UTU accepts CSXT's jurisdiction statement.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

UTU accepts listings 1 through 6 presented by CSXT. UTU denies the legal conclusion in No. 7 that the Michigan Department of Transportation (MDOT) lacks judicial power and affirmatively states that the administrative hearing at issue was "judicial" in nature. One additional statute addressing MDOT's powers is MICH. COMP. LAWS ANN. § 462.41, which provides in part as follows:

> "Upon the request of the commission [now MDOT] it shall be the duty of the attorney general, or the prosecuting attorney of the proper county, to aid in any investigation, prosecution, hearing, or trial had under the provisions of this act, and to institute and prosecute *all necessary actions or proceedings for the enforcement of this act and of all other laws of this state relating to common carriers*, and for the punishment of all violations thereof." (Emphasis added).

MICH. ADM. CODE RULE 460.1473 is set forth below in its entirety for ease of reference:

> "(1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.
>
> (2) All yard diesels shall have the floors cleaned and the windows washed at reasonable intervals.
>
> (3) All cabooses shall have the interior washed once each year. Road cabooses used on trains handling ore in open top equipment, and all yard and transfer cabooses, shall have the floors scrubbed or mopped once each month, if the crew using same request it.
>
> Windows on all cabooses shall be washed once a month, except in freezing weather.
>
> (4) When required by the season of the year,doors and windows of cabooses shall be equipped with adequate metal stripping. Similarly, when required by the season of the year,

cabooses shall be equipped with screen doors or screen panels, and windows on each side of each caboose shall be screened. Sliding screen windows, however, shall be deemed adequate.

(5) An adequate supply of cool, sanitary water, satisfactory for drinking purposes, shall be made available for the use of trainmen, enginemen and yardmen. Suitable sanitary containers, equipped with a faucet or other dispenser, shall be maintained on cabooses and locomotives, and individual drinking cups shall be furnished by the company.

(6) Every caboose used in any train in this state, regardless of service, shall be provided with a stove or other adequate means of heating. A sufficient amount of fuel for the trip or shift shall be made available.

(7) Baggage and express cars, when occupied by employees coming under the provisions of this act, will be so arranged in the train that employees required to ride such cars will have access to the drinking water, toilet and washing facilities provided in a coach in said train and, if it is found impractical to so arrange said cars in the train, then drinking water, toilet and washing facilities must be furnished for the employees riding said cars upon formal order of and by the commission.

STATEMENT OF THE CASE

UTU is unable to accept CSXT's statement of the case. UTU refers the Court to the statement of facts presented in the Court of Appeals and District Court opinions.

UTU must also point out that the contested Rule does not textually require installing toilets on locomotives and that it has never been authoritatively construed by MDOT to so require. CSXT's statement of the case fails to note that UTU has suggested alternative constructions.

CSXT has stated that two-thirds of its locomotives are already equipped with toilets. As UTU pointed out to the Courts below, the Rule could be complied with by using nonequipped locomotives on any consist (road train) where either another equipped locomotive is present or where an equipped passenger car or an equipped caboose is part of the same consist. Since most train consists include more than one locomotive, and since only one locomotive in the consist must be equipped, one of the unequipped locomotives could be

used on most consists in Michigan. Nonequipped locomotives also may be used in the yard areas since adequate facilities are usually available in the yard area. CSXT's Appendix G-6 recognizes this.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' observation that the LBIA does not prohibit concurrent state regulation or purport to occupy the field of railroad regulation was: (1) accurate, (2) does not conflict with prior rulings of this or other Courts, and (3) was superfluous to its holding that *Younger* abstention was appropriate.

The first argument raised by CSXT inaccurately portrays the decision of the Court of Appeals. CSXT claims that a comment made by the Court of Appeals in a paragraph providing background to the dispute was a holding that contradicted other Court decisions.

The complained of observation was not, however, a "holding" of the Court of Appeals. The complained of language was mere dicta and not necessary to the Court of Appeals' finding that *Younger* abstention was appropriate.

The background comment about which CSXT complains is where the Court said the LBIA:

> "lists certain equipment required for locomotives and railroad cars ... does not prohibit concurrent state regulation or purport to occupy the field of railroad [regulation]*." (App. B, p. B-4).
>
> *Misprinted in the text of the opinion as "negotiation".

This statement is in fact correct as far as it goes. CSXT is improperly reading the phrase "railroad regulation" to mean "locomotive regulation". These two phrases are, however, quite different. This Court held in *Napier* v *Atlantic Coastline*, 272 U.S. 605, 47 S. Ct. 207, 71 L.Ed. 432 (1926) that the LBIA occupied the field of locomotive equipment. The Court of Appeals did not deny this. The Court of Appeals merely said that the LBIA does not occupy the field of railroad regulation. Railroad regulation covers a much broader category than that of locomotives. This was recently recognized by the Fifth Circuit when it held in *Missouri Pacific Railroad Co.* v *Railroad Commission of Texas*, (MOPAC I), 833

F.2d 570, 576 (CA 5, 1987) that cabooses are not within the purview of the LBIA. The Court upheld a state rule requiring fire extinguishers and first-aid kits on cabooses and rejected an LBIA preemption claim. The LBIA would thus not preempt a state rule requiring toilets on cabooses or roadcars, which would be consistent with the disputed Rule's text.

The cases cited by CSXT which supposedly conflict with the observation of the Court of Appeals all specifically address regulation of locomotives and, therefore, are not in conflict with the Court of Appeals' statement that the LBIA does not occupy the field of railroad regulation. Railroad regulation encompasses the entire consist, roadcars, cabooses, railroad tracks, etc. and not only locomotives.

CSXT's argument is also erroneous in that it seems to assume that the Court of Appeals found the Rule was not preempted by the LBIA. A careful reading of the Court of Appeals' decision shows this is not the case. The Court of Appeals held that abstention was appropriate and then noted that the State Court system had jurisdiction to, and was capable of, resolving CSXT's constitutional claims.

The Court of Appeals' statement that the LBIA does not occupy the field of railroad regulation was in fact correct, does not conflict with any of the cases cited by CSXT and was unrelated to and did not affect its holding that *Younger* abstention was appropriate. The statement, therefore, does not provide a basis for granting certiorari. CSXT is still free to argue in the State Court system that the Rule is preempted by the LBIA.

II. A facial preemption claim is not presented where the Rule merely requires "adequate toilet facilities be made available", where the Secretary of Transportation has not prescribed rules covering locomotive toilets, and where the Federal Railroad Safety Act, 45 USC 421 et seq. (FRSA) allows state rules until the Secretary adopts a rule covering the subject matter.

CSXT complains that the Court of Appeals rendered a conflicting decision concerning the FRSA. This argument is incorrect in that the complained of language was not a "holding" of the Court but merely dicta found in a background paragraph. The complained of language is in fact correct and did not provide a basis for the Court's holding that *Younger* abstention was appropriate.

The comment about which CSXT complains is where the Court said the FRSA allows the Secretary of Transportation to:

> "prescribe appropriate rules for all areas of railroad safety," including rules concerning equipment and operating procedures. (Citing FRSA § 431 (a)). The Act allows limited concurrent state regulation.[3] (App B, p. B-4).

CSXT objects to the statement that the FRSA allows limited concurrent state regulation. The footnote at the end of the complained of language refers the reader to 45 USC § 434, the statute which sets forth the two instances when the FRSA does allow limited concurrent state regulation. The statement of the Court of Appeals was correct and is not in conflict with any court decisions.

The Sixth Circuit made an accurate statement, i.e., limited concurrent state regulation is allowed. CSXT has not cited any cases which state that § 434 of the FRSA is not the law. It would indeed be unusual to find a conflict here since the Court was merely summarizing a statute.

CSXT's discussion of how "cover the subject matter" should be construed is irrelevant to the instant petition because the Court of Appeals did not even address this issue. The Court's decision does not foreclose CSXT from arguing in favor of FRSA preemption in the state court proceedings.

The disputed MDOT rule is not facially preempted by the FRSA. The Rule textually requires "adequate toilet facilities be made available." The Court of Appeals correctly stated on page 5 of its opinion that the Secretary has not prescribed rules directly governing locomotive toilets. The District Court stated that "locomotive commodes do not appear as specific regulated items", see Appendix D-5. These statements fully demonstrate that the disputed MDOT Rule is not "facially" preempted by the FRSA. A fair argument exists concerning how "covers the subject matter" should be construed and, therefore, the Rule may be valid as the Secretary has not adopted a rule covering toilets. A facial preemption claim thus simply does not exist.

The alleged conflict does not exist. The complained of statement is irrelevant to the Court of Appeals' holding that *Younger* abstention was appropriate. The complained of statement was dicta and in fact quite accurate.

III. This is not an appropriate case to determine if a facially conclusive preemption claim renders abstention inappropriate because CSXT's claim is not facial, only substantial, the lower court did not directly address the issue and other courts have not yet directly addressed the issue.

CSXT claims that the Sixth Circuit held that *Younger* abstention is appropriate in facially conclusive preemption claims. This is an incorrect assessment of the Court's decision.

In *New Orleans Public Service, Inc.* v *Council of City of New Orleans (NOPSI)*, 491 U.S. _____, 109 S. Ct. 2506, 105 L.Ed.2d 298 (1989), this Court rejected an argument that *Younger* does not require abstention in the face of a substantial preemption claim. This Court said it disagreed with such a contention. Thereafter, in dicta, this Court said that perhaps a facially conclusive (in contrast with a substantial claim) preemption claim would render *Younger* abstention inappropriate.

The Court of Appeals did not, however, acknowledge the possible distinction between a facially conclusive and a substantial preemption claim suggested by the dicta in *NOPSI*. The Court of Appeals relied on this Court's direct rejection of the claim that *Younger* abstention is foreclosed due to a substantial preemption claim. The Court of Appeals stated:

> "We do not see any reason to analyze abstention cases involving a preemption claim differently than other abstention cases." (App. B, p. B-9).

Thus, the Sixth Circuit did not directly address whether *Younger* abstention is appropriate when a facially conclusive preemption claim is presented. CSXT cannot argue that the Court of Appeals decided this issue. CSXT even states on pages 11-12 of its petition that the Court of Appeals did not acknowledge that *NOPSI* distinguished between "substantial" preemption claims and "facially conclusive" preemption claims. Thus, the very issue framed by CSXT is not supported by the Sixth Circuit's decision. The Court of Appeals' decision does not purport to answer the question left open by the *NOPSI* Court's dicta.

This case is not an appropriate vehicle to determine if *Younger* abstention is inappropriate when a federal Court is faced with a facially conclusive preemption claim because CSXT's claim is not facially

conclusive and because this issue has not yet had a chance to percolate through the lower courts.

A. CSXT's preemption claim is not facially conclusive.

The disputed Rule requires that "adequate toilet facilities" be made available for trainmen, enginemen, and yardmen. The Rule never mentions the word locomotive and does not use the word installation. CSXT's entire preemption claim is premised on a construction of the Rule which would require the installation of toilets on its presently non-equipped locomotives. CSXT claims that MDOT interprets the Rule to require installation of toilets on its locomotives. It is true that the assistant attorney general representing the enforcement division of MDOT has advocated this construction in the preliminary stages of this proceeding. This, however, is not the same thing as a definitive construction of the Rule by the agency itself.

This is clearly set forth in *Attorney General* v *Michigan Public Service Commission*, 412 Mich 385, 420; 316 NW2d 187 (1982), where the Michigan Supreme Court said:

"While lawyers often make concessions binding on their clients in particular litigation, *the views of a lawyer representing a regulatory commission should not be accepted by this Court as an authoritative construction by an agency charged with the administration of an act. The authoritative statement of the views of the commission regarding its concept of the meaning of the utility securities act is to be found in its decisions and opinions.*" (emphasis added).

This language is applicable to the Rule before this Court. This disputed Rule has not been construed by an MDOT administrative law judge or by the Transportation Commission itself. No agency decisions or opinions exist which provide the agency's interpretation of the Rule.

UTU believes that requiring toilets on all locomotives is one way to enforce the Rule. This, however, is a long way from saying that it is the only way to comply with the Rule. The Rule textually does not require the installation of toilets on locomotives. In fact, a review of all seven subsections of the rule demonstrates that the rulemakers were not averse to prescribing rules for particular train cars. For example, the seven subsections of the Rule list the following train cars: yard diesels, road cabooses, yard cabooses, transfer cabooses,

locomotives, baggage cars, express cars and coaches. Specific requirements are set forth for these listed train cars. No particular cars are listed in the first subsection of the Rule, which is the portion of the Rule disputed herein. The thrust of the first subsection is availability of toilet facilities to trainworkers and not on which train car such facilities must be made available. The failure to use the word locomotive in the first subsection,when it is used in the fifth subsection, shows a lack of intent to impose a specific requirement upon locomotives as the only way with which the rule may be complied. Therefore, it cannot fairly be said that a facial preemption claim exists.

In *NOPSI*, this Court analyzed whether a facial preemption claim existed. The Court said:

> But we cannot conclusively say it is wrong without further factual inquiry — and what requires further factual inquiry can hardly be deemed "flagrantly" unlawful for purposes of a threshold abstention determination. (*NOPSI*, 491 U.S. ____, 109 S. Ct. at 2517).

Thus, further inquiry negated a claim of facial preemption. The text of the disputed Rule, which has never been authoritatively construed, cannot be deemed flagrantly in violation of the LBIA or FRSA. The Rule on its face cannot be said to be plainly invalid. One must look beyond the face of the Rule to find preemption.

B. The issue has not percolated through the lower courts.

Even if the disputed Rule textually required the installation of toilets on locomotives (which it does not), this would not be an appropriate case to determine if *Younger* abstention is inapplicable to facially conclusive preemption claims.

The possibility that facially conclusive preemption claims may not be subject to *Younger* abstention was raised for the first time in dicta by this Court in its June 19, 1989 decision in *NOPSI*. The Sixth Circuit's opinion did not directly address this issue. CSXT has not cited any other lower court decisions which have attempted to answer this question. Given the recent origin of this possible distinction, this Court would be well advised to let the lower courts grapple with the issue. This will allow the competing policy issues and legal theories to be applied in a variety of factual situations. Once these have been considered in the lower courts, a consensus may be reached

or at least competing legal theories may be presented from which this Court may choose. It would be premature for this Court to seek to resolve this question without the benefit of lower court decisions. There can be no question that this issue is deserving of a thorough airing in the lower courts before this Court attempts to resolve it.

The above reasoning also applies to CSXT's suggestion that this Court should clarify that *Public Utilities Commission of Ohio* v *United Fuel Gas*, 317 U.S. 456, 63 S. Ct. 369, 87 L.Ed. 396 (1943) survives *Younger* v *Harris*, 410 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), and *Ohio Civil Rights Commission* v *Dayton Christian Schools*, 477 U.S. 619, 106 S. Ct. 2718, 92 L.Ed.2d 1 (1986). Once again, this is a question the Sixth Circuit did not address, and CSXT has not cited any Court opinion that has addressed this issue. Moreover, it is not clear that any clarification is necessary. *United Fuel Gas* invalidated orders that were plainly invalid on their face. *Younger* allows invalidation of a statute that is flagrantly and patently unconstitutional.

The Court also should recognize that CSXT's statement on page 14 of its petition that *United Fuel Gas* refused to apply abstention to a facially conclusive claim neglects to mention that it was *Pullman* abstention which was not applied, *Railroad Commission* v *Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941). *Younger* was not decided until 1971.

UTU further refers the Court to the decision of the Sixth Circuit, which demonstrates that no good reason exists to analyze abstention cases involving a preemption claim differently from other abstention cases.

IV. The Court of Appeals' decision that the MDOT administrative proceeding was "judicial" in nature was correct and not in conflict with any decisions of this Court or the Michigan Supreme Court.

CSXT contends that the administrative hearing at issue was not "judicial" in nature and, therefore, *Younger* abstention was inappropriate.

Pages 9-12 of CSXT's Appendix G reproduce the notice of hearing issued by the administrative law judge. The notice indicates that the contemplated hearing was to be conducted in accordance with, inter alia, 1969 PA 306 Ch 4, i.e., Chapter 4 of the Michigan

Administrative Procedures Act, MICH. COMP LAWS ANN. § 24.271-287 (pertinent parts reproduced verbatim in Appendix E).

These statutes provide for a contested hearing containing all the hallmarks of a hearing which are "judicial" in nature. These statutes provide for the following:

1. Representation by counsel.
2. The filing of pleadings.
3. Subpoenaing of witnesses and documents.
4. Direct and cross examination of witnesses.
5. A decision by a neutral administrative law judge (presiding officer).
6. A decision by the agency.

All of the above listed procedures fully indicate that the administrative hearing at issue was "judicial" in nature.

Further guidance is provided by *NOPSI*. Therein the Court explained that an agency's proceedings are characterized as judicial or legislative depending on the "nature of the final act" which it is designed to produce. *NOPSI*, 109 S. Ct. at 2519. *NOPSI* cited with approval the following language from *Prentis* v *Atlantic Coast Line Inc.*, 211 U.S. 210, 226, 20 S. Ct. 67, 53 L.Ed. 150 (1908), where the Court said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new result to be applied thereafter to all or some part of those subject to its power."

The hearing at issue was to investigate and determine if CSXT had violated a state Rule in the past and therefore can only be characterized as "judicial" in nature.

In *Middlesex County Ethics Comm* v *Garden State Bar Association*, 457 U.S. 423, 433-434, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1982), and in *Ohio Civil Rights Commission* v *Dayton Christian Schools, Inc.*, 477 U.S. 619; 106 S. Ct. 2718; 92 L.Ed.2d 1 (1986), the court found state administrative hearings to be "judicial" in nature.

CSXT's reference to the Michigan Constitutional provision that requires separation of powers is inapplicable, Mich. Const. Art III § 2. In Michigan, an agency may exercise quasi-judicial powers notwithstanding the separation of powers provision of the Michigan Constitution. Were this not true, all of Chapter 4 of the Michigan Administrative Procedures Act would be unconstitutional. MDOT was to be exercising quasi-judicial power when it held the contested case hearing, and this is sufficient to constitute a proceeding that is "judicial" in nature.

CSXT next contends that the administrative hearing was not "judicial" in nature because MDOT was acting as both the "adversary and decisionmaker".

MDOT is a large state agency with many divisions. A complaint was filed by UTU alleging that CSXT had violated a Rule. MDOT's enforcement division investigated the claim. Upon a determination that the complaint merited further review, a hearing was scheduled. The hearing was to be held by an impartial administrative law judge. The enforcement division was to be represented by an assistant attorney general. CSXT was allowed to have its own counsel. The administrative law judge was to determine if the Rule had been violated. The agency thereafter would issue a final order. If still aggrieved, CSXT could seek judicial review through the State Court system.

The claim that MDOT was both adversary and decisionmaker is thus without merit. In reality, the hearing was similar to a criminal prosecution in that a party files a complaint, a prosecutor authorizes the filing of charges and thereafter a trial is held before a judge. Under CSXT's convoluted reasoning, the State is the adversary and decisionmaker in criminal proceedings; after all, the police, prosecutor, and judge all work for the government. In *Withrow* v *Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975), the Court stated that it was permissible for a judge to preside at a bench trial over a defendant even where the same judge had previously authorized an arrest warrant because probable cause existed to believe a crime had been committed.

CSXT states that the essence of a judicial proceeding is a neutral forum. The Michigan Administrative Procedures Act meets this concern by requiring that administrative hearings be conducted in an impartial manner before an unbiased officer, MICH. COMP. LAWS ANN. § 24.279.

The Court of Appeals' decision that the Michigan administrative proceeding at issue was "judicial" in nature was clearly correct and not in conflict with any Court holdings.

V. The Court should not grant certiorari to this case because grounds not considered below exist which this court would also have to accept if certiorari is granted.

UTU raised several grounds for reversal in its appeal before the Sixth Circuit. That Court only addressed one of the issues raised, i.e., *Younger* abstention. The Court did not address other arguments UTU had presented. These other meritorious issues would have to be evaluated by this Court if it were to grant certiorari. Having to rule on these issues without having the benefit of a decision from the Court of Appeals to review militates against granting CSXT's petition.

A. CSXT Failed to Exhaust its Administrative Remedies

UTU argued before the District Court and Court of Appeals that CSXT was not entitled to any relief in federal court because it had not exhausted its administrative remedies. If certiorari is granted, this Court will have to address the merits of this contention without having the benefit of a ruling from the District Court or Court of Appeals on the issue.

The doctrine of exhausting administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, *Myers* v *Bethleham Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L.Ed. 638 (1938). CSXT failed to exhaust its administrative remedies in that it did not participate in the scheduled contested hearing or thereafter appeal any order entered against it. At the time CSXT filed suit, MDOT had not ordered CSXT to do anything.

Exhaustion is warranted when the matter involves an unsettled question of law or when the agency could resolve the matter on non-constitutional grounds. *Aircraft & Diesel Equipment Corp.* v *Hirsch*, 331 U.S. 752, 67 S. Ct. 1493, 91 L.Ed. 1767 (1947).

The Sixth Circuit stated on page 7 of its opinion that "it is not prudent for courts to interfere in the regulatory process before the facts are sorted out and the regulatory *rule is defined and applied*"

(emphasis added). The Rule at issue has not been defined or applied by the state administrative law judge or the Transportation Commission on review of the administrative law judge's decision. UTU had made clear that CSXT's challenge to the Rule could have been resolved by the agency on nonconstitutional grounds. This Court carefully noted in *United Fuel Gas* that the federal court plaintiff had exhausted its administrative remedies prior to seeking an injunction in federal court, 317 U.S. at 470.

The Rule textually only requires availability, not installation of toilets on locomotives. Two-thirds of CSXT's locomotives have toilets already installed on them. In light of the fact that almost all consists have two or more locomotives on them, the problem for CSXT could be considered one of dispatching and not installation. See page 6 of CSXT's exhibit G which acknowledges this. It is apparent that CSXT jumped the gun. MDOT had not authoritatively construed the Rule. MDOT had not entered a cease and desist order. MDOT was never given the chance to construe the Rule. If MDOT had entered an order forbidding CSXT from running consists in Michigan without having one equipped locomotive or some other equipped car, then CSXT would not be required to install any toilets. Other rulings MDOT could have made short of ordering the installation of toilets demonstrate the reason the District Court's opinion was premature, advisory and totally unwarranted. The express policy reasons which gave rise to the holding of *Hirsch* are present in the case before the Court.

B. The District Court ignored its duty to give the rule a limiting construction which would save it from the perceived preemption but instead improperly enjoined one possible construction of the Rule.

Statutes (and administrative rules) are to be presumed constitutional, *Fleming* v *Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 4 L.Ed.2d 1435 (1960). It is a cardinal principle that Courts are to seek statutory constructions which avoid constitutional doubts, *Johnson* v *Robinson*, 415 U.S. 361, 366-367, 94 S. Ct. 1160, 39 L.Ed.2d 389 (1974). A state statute which has not been authoritatively construed by a state court should be construed in a manner that will avoid constitutional questions, *New York* v *Ferber*, 458 U.S. 747, 102 S. Ct. 3348; 73 L.Ed.2d 1113 (1982).

The District Court failed to pay homage to or to obey either of these admonitions. The disputed Rule has never been authoritatively construed by the Transportation Commission, an MDOT administrative law judge or a state court. The District Court put the cart before the horse by advising that one construction was preempted instead of abstaining so the agency or state court could construe the Rule. At a minimum, the District Court should have given the Rule a limiting construction. The Court in *Moore* v *Sims*, 442 U.S. 415, 429-430, 99 S. Ct. 2371, 60 L.Ed.2d 994 (1979) stated that *Younger* abstention:

> "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests".

This language fully supports the Court of Appeals' decision to require abstention.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, respondent United Transportation Union submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

William Reid Ralls—
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Dated: February 23, 1990

APPENDIX A

BEST AVAILABLE COPY

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 88-1629

CSXT, INC, a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ and NORMA J. FLEMING, in their official capacities;
DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN,
Defendants-Appellants (88-1642),

THE UNITED TRANSPORTATION UNION,
Intervening Defendant-Appellant (88-1629).

Before: MERRITT and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated and the case is remanded with instructions to dismiss.

IT IS FURTHER ORDERED that Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN
Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: October 12, 1989

COSTS: APPELLANT TO RECOVER

Filing Fee ..... $
Printing $176.00
Total..... $

APPENDIX B

BEST AVAILABLE COPY

Nos. 88-1629; 88-1642

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan, and the DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN,
Defendants-Appellants (88-1642),

and

THE UNITED TRANSPORTATION UNION,
Intervening Defendant-Appellant (88-1629).

ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed August 22, 1989

Before: MERRITT and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

MERRITT, Circuit Judge. The defendants, James J. Pitz, Norma J. Fleming and Michigan Department of Transportation, and the intervening defendant, United Transportation Union, appeal on abstention grounds a District Court injunction restraining the Department from enforcing any state administrative action or rule requiring toilets in railroad locomotives. The injunction was issued on grounds that such a Michigan rule would be preempted by the Locomotive

Boiler Inspection Act, 45 U.S.C. §§ 22-43 (1976) and the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976). The District Court held that the preemption doctrine prohibits the state agency from conducting the contemplated proceeding.[1] The central problem raised by the appeal is whether abstention is appropriate in preemption cases. We conclude under the circumstances of this case that abstention is appropriate; and we, therefore, reverse the order of the District Court. *CSXT, Inc. v. Pitz*, 699 F.Supp. 127 (W.D. Mich. 1988).

I.

The facts are not in dispute. The plaintiff, CSXT, is an interstate railroad system operating in Michigan. About one-third of CSXT's locomotives are not equipped with toilets. The defendant, Michigan Department of Transportation, has a general rule requiring that all railroads have "adequate toilet facilities" for the health of their employees. Mich. Adm. Code Rule 460.1473(a).[2]

The intervening defendant-appellant, United Transportation Union, is an international union representing CSXT train crews working in Michigan. After receiving reports that crew members were being asked to work on CSXT locomotives that did not provide toilet facilities, the Union

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[1] The language of the District Court's injunction is as follows:

> In accordance with the accompanying opinion, this Court grants plaintiff's motion for summary judgment, declares that the LBIA and the FRSA each preempts Rule 460.1473(a), insofar as it is construed to require commodes on locomotives operating in Michigan, and enjoins MDOT from so construing and enforcing the rule.

[2] Rule 460.1473(a) provides in pertinent part:

> Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order of the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

filed a complaint with the Michigan Department of Transportation. The complaint charged CSXT with violating the Michigan rule requiring railroads to have "adequate toilet facilities."

The agency scheduled a hearing before an administrative law judge after CSXT had filed a motion to stay the administrative proceedings. CSXT then filed a suit for injunctive and declaratory relief in federal court. After a hearing, the ALJ denied CSXT's motion for stay. She stated that she doubted that the agency had the authority to entertain the constitutional claims but cited Michigan authority holding that although Michigan administrative agencies ordinarily do not entertain constitutional claims, such claims may be raised in court on review of the agency's decision. Joint Appendix at 107. Additionally, the ALJ said that the sanitary regulations at issue were well within the police powers of the state. She refused to hold that the federal statutes relied upon by CSXT were intended "to prohibit state regulation in an area so basic to public health." *Id.* at 108.

The federal District Court granted the Union's motion to intervene on February 4, 1988, and on the same date entered a preliminary injunction restraining the state agency from enforcing its rule and restraining the agency from conducting the scheduled administrative proceedings until the District Court ruled on CSXT's motion for summary judgment. On February 10, 1988, the Union filed a motion to abstain. The District Court did not expressly consider or rule on the Union's abstention motion. The court found the state rule as applied to locomotives to be preempted by federal law and, therefore, without oral argument granted CSXT's summary judgment motion and issued a permanent injunction.

This appeal requires us to answer two questions. First, does the fact that this case raises preemption rather than other types of constitutional issues require us to modify the classic abstention analysis? And second, once the proper

mode of analysis is determined, does it require abstention in this case?

II.

The first question presented is whether the fact that this case is a preemption case, rather than another type of federal question case, should alter the way in which we view the abstention question. We conclude that it should not.

Two federal statutes are claimed to preempt the Michigan regulation. The Federal Boiler Inspection Act, 45 U.S.C. §§ 22-43 (1976), first adopted in 1911, lists certain equipment required for locomotives and railroad cars. Enforcement of the act is by civil penalty ("not less than $250 and not more than $2500") assessed by the Secretary of Transporation, which may be collected by suit in federal court. *Id.* at § 34. The Act does not prohibit concurrent state regulation or purport to occupy the field of railroad negotiation. The Railroad Safety Act, 45 U.S.C. §§ 421-44 (1976), adopted in 1970, is broader. It allows the Secretary to "prescribe . . . appropriate rules . . . for all areas of railroad safety," including rules concerning equipment and operating procedures. *Id.* at § 431(a). The Act allows limited concurrent state regulation.[3] The Act also provides for a similar but more elaborate system of enforcement through the

[3] The Act states:

> The Congress declares that laws . . . relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law . . . relating to railroad safety *until such time as the Secretary has adopted a rule . . . covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law . . . relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law . . . and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (1976)(emphasis added).

assessment and collection of civil penalties. *Id.* at § 436. The Secretary has not prescribed rules directly governing locomotive toilets, but CSXT argues that the Secretary has adopted general rules "covering the subject matter" and, therefore, has preempted Michigan law.

The Supreme Court in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, ____ U.S. ____, 109 S.Ct. 2506 (1989) (holding federal abstention not appropriate in favor of state administrative proceedings which are legislative in character), *reversing* 798 F.2d 858 (5th Cir. 1986), has recently rejected the argument that the presence of a preemption question bars a court from applying *Younger* abstention. The Court rejected NOPSI's contention that a district court presented with a preemption-based request for equitable relief was *a priori* divested of its power to abstain.[4]

The recent ruling in *NOPSI* casts doubt on the holding of the Eighth Circuit in *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985). There the Eighth Circuit declined to abstain in a nuclear power case in which it found that the Arkansas Public Service Commission was interfering with the jurisdiction of the Federal Energy Regulatory Commission. The state agency threatened to hold illegal certain purchase contracts between a large, multi-state, electric utility and its Arkansas subsidiary. The Arkansas agency apparently wanted to deter the state subsidiary from taking nuclear power from the parent, and the court suggested that such a state decision would have a serious effect on the parent's construction of

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[4] [O]ne of the issues in the present case is whether the principle of *Younger* can properly be extended to this type of suit. NOPSI argues that *Younger* does not require abstention in the face of a substantial claim that the challenged state action is completely pre-empted by federal law.... We disagree.

NOPSI, 109 S.Ct. at 2516.

a multi-billion dollar nuclear power plant. The basis of the Court's abstention ruling is not entirely clear, but it appears that the Court declined to abstain because it considered *federal regulatory jurisdiction* over the power contracts in question to be exclusively vested in the federal power agency. The Eighth Circuit did not discuss whether it considered the *federal court's jurisdiction* over the preemption issue to be exclusive or concurrent with the state court's.

The abstention issue in preemption cases should not turn on a determination concerning the location of exclusive regulatory jurisdiction in a federal or state agency. The state-federal regulatory jurisdictional issue usually turns, in one form or another, on whether the activity in question is characterized as intrastate or interstate. *See, e.g.*, Federal Power Act, 16 U.S.C. § 824(b)(1)(1976)(distinction stated as "transmission of electrical energy in interstate commerce" or "the sale of electrical energy at wholesale" versus "local distribution" or "the transmission of eletrical energy in intrastate commerce"). Under such statutes, the regulatory jurisdiction is exclusively state if the activity is intrastate, and exclusively federal if interstate. Such determinations of regulatory jurisdiction are often highly fact-specific and address themselves in the first instance to the expertise of the administrative agencies charged with economic regulation of the particular industry. In such cases both Congress and the state legislature have delegated frontline authority to find facts and devise economic regulations to administrative bodies with specialized knowledge of the industries to be regulated. Ordinarily, it is not prudent for courts to interfere in the regulatory process before the facts are sorted out and the regulatory rule is defined and applied.

In the present case there is no grant of exclusive jurisdiction to federal courts to resolve federal railroad safety questions or preemption claims in this area of the law. State courts do not lack jurisdiction over railroad safety issues or preemption claims. State courts normally have concurrent

jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79 (1981); *Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1282-86 (6th Cir. 1988).

Other policies support our holding that abstention cases involving preemption should not be treated differently than other abstention cases. We reject the oft-repeated assertion that the federal courts have "unique expertise" in adjudicating preemption claims because they are "comparatively more skilled at interpreting and applying federal law and are much more likely to correctly ascertain congressional intent." Note, *The Preemption Dimension of Abstention*, 89 Colum.L.Rev. 310, 322-23 (1989). State judges are not inferior to federal judges. They have the ability to interpret federal statutes, however complex. Though preemption is a constitutional issue, it is not of a differrent order of magnitude than due process, first amendment and other constitutional issues which often arise during the course of a state or federal administrative and judicial proceeding. To hold that a state court may decide federal constitutional issues generally but should not decide preemption issues makes little sense.

State courts frequently decide such issues. It may be argued that state judges are somewhat more inclined to read state regulatory jurisdiction more broadly than federal judges. Compare *Michigan Gas Storage Co. v. Michigan Public Service Comm'n*, 405 Mich. 376, 275 N.W.2d 457 (1979), in which the Michigan Supreme Court, after extensive analysis of the federal Natural Gas Act, concluded that the Act does not preempt state regulation of the securities of gas companies, with *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986), *aff'd*, 108 S. Ct. 1145 (1988), reaching the opposite result. But see *Natural Gas Pipeline Co. v. Illinois Commerce Comm'n*, 33 Ill.2d 214, 210 N.E.2d 490 (1965), in which the Illinois Supreme Court held Illinois regulation of natural gas securities preempted by the Natural

Gas Act. Even if it were true that state judges were less inclined to displace state regulatory jurisdiction than federal judges, this tendency is not a sufficient reason to modify the doctrine of abstention by substituting federal for state judges in cases raising preemption issues.

The Tennessee Court of Appeals recently decided a preemption issue under the Federal Railroad Safety Act similar to the one raised in the present case. The issue was whether the federal Act preempts state administrative proceedings enforcing a requirement concerning the construction of "walkways" in railroad switching yards. Judge Cantrell, after extensive analysis of the issue, concluded that Tennessee's walkways rule was not covered by a federal rule on the same subject matter and, therefore, was not preempted. *Illinois Central Gulf Ry. Co. v. Tennessee Public Service Comm'n*, 736 S.W.2d 112, 115 (Tenn.App. 1987).

In fact, state courts are often in a better position to decide preemption issues because they would do so on review of an administrative decision finding the facts. The threshold determination of whether jurisdiction over an activity is exclusively federal or state or is concurrent is often highly fact-specific and often requires the specialized knowledge of the state administrative agency to which regulation of the activity has been delegated.

Moreover, even if we accepted the proposition that some state courts lacked the necessary expertise, the resulting harm—that a case could be decided incorrectly by a state court and be denied certiorari by the United States Supreme Court so that federal-court review of the incorrectly decided constitutional claim was precluded—is no greater than it is when a federal court incorrectly decides a case, and the United States Supreme Court declines review. If the federal decision to abstain and the state decision to assert jurisdiction were inappropriate, it may be that the doctrine of res judicata should not apply in full force to the state court

judgment. *See Key v. Wise*, 454 U.S. 1103 (1981)(Brennan, J., dissenting from denial of *certiorari*).

In summary, we do not see any reason to analyze abstention cases involving a preemption claim differently than other abstention cases. In particular, we do not agree that the decisive abstention question in preemption cases arising from pending state administrative proceedings is whether the *regulatory authority* over the particular activity in question is exclusively federal or exclusively state. A federal court need ask itself only two questions: whether the state court has concurrent judicial jurisdiction to decide the preemption question, and, if the answer to that question is "Yes," whether a federal court should abstain in favor of ongoing state proceedings originating in the state regulatory agency. There is no question in the present case that concurrent *judicial* jurisdiction exists. We, therefore, proceed to inquire whether abstention is appropriate.

III.

Abstention pursuant to the judicially-crafted rule announced in *Younger v. Harris*, 401 U.S. 37 (1971), is appropriate only where a court can answer all three of the following questions in the affirmative:

> [F]irst, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). In the present case we answer affirmatively all three questions.

Is the administrative proceeding here an "ongoing state judicial proceeding?" *Middlesex*, 457 U.S. at 432. Under the Supreme Court's recent analysis is *NOPSI*, it clearly is. There the Court explained that an agency's proceeding will

be characterized as judicial or legislative depending on the "nature of the final act" which it is designed to produce. *NOPSI*, 109 S.Ct. at 2519 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908)(Holmes, J.)). Where the proceeding "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," it is judicial. *Id.* at 2520 (quoting *Prentis*, 211 U.S. at 226). We are faced with an administrative proceeding before the Michigan Department of Transportation in which the interpretation and application of a state rule requiring "adequate toilet facilities" are in question and in which the final result will be a determination whether CSXT is liable for a violation of this established rule. There is, thus, an ongoing state proceeding that is judicial in nature, and we must acknowledge that it implicates all the comity concerns that motivate the *Younger* doctrine.

The third requirement—of an "adequate opportunity" to raise the issue—is also met, even though the state administrative agency may have no power to hear CSXT's constitutional claim, because Michigan law supplies full judicial review of this agency proceeding. The Michigan Administrative Procedures Act, Mich. Comp. Laws § 24.301, provides for review of such proceedings, and the Michigan courts will entertain the federal question on review. *See Michigan Gas Storage Co., supra* (reviewing preemption issues); *Blue Cross and Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 300 (6th Cir. 1984).

Our analysis of this question has been decisively settled by decisions of the Supreme Court and this Court. In *Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988), our Court traced the development of the doctrine of abstention as it applies to pending state administrative proceedings. In *Watts*, a doctor faced a license suspension proceeding before the Tennessee Board of Medical Examiners, a proceeding in which his federal constitutional claims could first be adjudi-

cated only by a state court in review of the decision of the Board. Judge Contie, writing for our Court, concluded that Supreme Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), governs the question:

> Watts contends that he will not be permitted to assert his constitutional claims in the administrative proceedings before the Board. This contention is supported by the record, which shows that after Watts asserts his constitutional claims as affirmative defenses to the Division's motion to summarily suspend his license, the Division successfully brought a motion to strike those defenses on the ground that they were not within the scope of review of proceedings before the Board of Medical Examiners. This fact alone does not, however, establish that Watts will be deprived of an opportunity to present his constitutional claims. In *Dayton Christian Schools*, the Supreme Court stated that "it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding."

Watts, 854 F.2d at 848. The Full quotation from the *Dayton Christian Schools* case is as follows:

> In any event, it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding. Section 4112.06 of Ohio Rev. Code Ann. (1980) provides that any "respondent claiming to be aggrieved by a final order of the commission . . . may obtain judicial review thereof." Dayton cites us to no Ohio authority indicating that this provision does not authorize judicial review of claims that agency action violates the United States Constitution.

477 U.S. at 619.

Finally, we do not agree that the state proceedings which CSXT seeks to have enjoined do not implicate vital state interests. The unsanitary disposal of human waste creates a risk of pollution and disease: preventing such risks is one of

the preeminent functions of the state's police power to protect the health and safety of its residents. A finding of preemption will bar the enforcement of a state law, but it is not a finding that the state has no important interest. Rather it is finding that the federal interest is more important or more vital than the state interest, so that the supremacy clause requires that the federal interest prevail.

The case before us thus involves an ongoing state administrative proceeding that is judicial in nature; it involves a state administrative proceeding from which CSXT may appeal to Michigan state courts to obtain a ruling on its constitutional claim, and it arises in an area in which Michigan has a vital state interest. Every element of abstention is present.

IV.

For all the foregoing reasons, we conclude that the District Court should have abstained. Our holding should not be read as applying a hard and fast rule of abstention in all state administrative matters involving preemption, for as Professor Shapiro has aptly warned:

> The complexity of our federal system—the tension between notions of separateness and interdependence, between the existence and the limits of federal supremacy—makes it impossible to frame a simple rule that will resolve every case. Sometimes these tensions cut in favor of federal action. At other times, they counsel reluctance to pull apart federal and state issues that are not easily separated; to disrupt ongoing state proceedings unless the very prosecution of those proceedings, regardless of their outcome, threatens impairment of federal rights; to take over the management of state institutions; or to assume the inability of state courts to recognize and enforce federal rights.

Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 583 (1985). We find no considerations in this case, however, which would counsel the federal courts to interfere with the ongoing railroad safety proceeding in the Michigan Department of Transportation. Accordingly, the judgment of the District Court is vacated and the case remanded with instructions to dismiss.

APPENDIX C

BEST AVAILABLE COPY

No. 88-1629

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, *et al.*,
Defendants,

UNITED TRANSPORTATION UNION,
Defendant-Appellant

ORDER

Before: MERRITT, Chief Judge, BOGGS, Circuit Judge, and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

APPENDIX D

BEST AVAILABLE COPY

CXST, INC., a Virginia
Corporation, Plaintiff,

— v.

James J. PITZ, Director of the Department of Transportation of the State of Michigan, Norma J. Fleming, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan, and the Department of Transportation of the State of Michigan, Defendants,

and

The United Transportation Union,
Intervening Defendant.

No. L 88-17 CA 5.

United States District Court,
W.D. Michigan, S.D.

May 13, 1988.

Railway company operating in both Canada and United States sought declaratory judgment that state rule requiring locomotives operating within state to have commodes in them was preempted by federal law. The District Court, Robert Holmes Bell, J., held that both Federal Railroad Safety Act and Locomotive Boiler Inspection Act completely preempted state regulations dealing with locomotives, its boiler, tender, and all parts and appurtenances including state regulation requiring locomotives to have commodes.

Judgment for plaintiff.

Employers' Liability Key 46
States Key 18.45

Both Federal Railroad Safety Act and Locomotive Boiler Inspection Act completely preempted state regulation dealing with a locomotive, its boiler, tender, and all parts and appurtenances thereof, including state regulation requiring locomotives to have commodes; state regulation was within subject matter already contained within federal regulations. Boiler Inspection Act, 45 U.S.C.A § 22 et seq.; Federal Railroad Safety Act of 1970, § 101 et seq., 45 U.S.C.A. § 421 et seq.; U.S.C.A. Const. Art. 6, cl. 2

Patrick E. Hackett, Carol Hackett-Garagiola, Bloomfield Hills, Mich., Sally J. Kircher, Jacksonville, Fla., for plaintiff.

Frank J. Kelley, Atty. Gen., State of Mich. by Susan Peck Iannotti, William Reid Ralls, Lansing, Mich., for defendants.

OPINION

ROBERT HOLMES BELL, District Judge.

Before this Court is plaintiff's motion for summary judgment on its complaint. In its complaint plaintiff seeks a judgment declaring that the Michigan Department of Transportation (MDOT) Rule 460.1473(a) is preempted by the Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.* and an injunction prohibiting defendant MDOT from enforcing Rule 460.1473(a) against CSXT.

BACKGROUND

CSXT is a railway company operating in Canada and twenty states including Michigan. United Transportation Union (UTU), intervening defendant, represents railroad workers and complained to MDOT that CSXT violated Rule

460.1473(a) by failing to provide commodes on locomotives operating in Michigan. MDOT scheduled a hearing on the complaint before an administrative law judge for February 10, 1988. On January 23, 1988, CSXT filed this lawsuit for declaratory and injunctive relief. On January 27, 1988, an MDOT administrative law judge denied CSXT's motion to stay state administrative proceedings pending this Court's determination of CSXT's claims that Rule 460.1473(a) was preempted. On February 8, 1988, this Court granted CSXT's motion for a preliminary injunction restraining defendants from enforcing Rule 460.1473(a) until August 4, 1988, or until this Court's ruling on CSXT's motion for summary judgment.

Of CSXT's 3,000 locomotives approximately 1,000 do not have commodes. Some unequipped locomotives operate in Michigan. However, CSXT indicates that it plans to equip all of its locomotives with commodes within three years.

The disputed rule textually requires "adequate toilet facilities," but does not specifically require equipping each locomotive with an individual commode. Nevertheless, MDOT has argued its position assuming that enforcement of Rule 460.1473(a) would require equipping locomotives with commodes. The administrative law judge's analysis presumes the same. Although UTU does not concur with MDOT that the rule requires a commode on every locomotive, for purposes of its preemption analysis this Court assumes that application of the rule would require installation of a commode on each CSXT locomotive operating in Michigan. Rule 460.1473(a) provides:

> Running Facilities
> Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in reasonably clean and sanitary condition.

ANALYSIS

The issue before this Court is whether Rule 460.1473(a) is preempted by the Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.*

The doctrine of preemption is based upon the supremacy clause of the Constitution, art. VI, cl. 2, which mandates that federal law overrides any conflicting state regulation. Moreover, when exercising one of its plenary powers, Congress can occupy an entire regulable field with federal law and effectively prohibit any parallel state legislation. *Missouri-Pacific Railroad Company v. Porter*, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672 (1927). Congress can clearly manifest its intention to preempt state law by explicitly stating its intent to totally occupy a field. Or in lieu of any clear manifestation courts will discern the clarity of Congress' intent to preempt state regulation by the pervasiveness of the federal regulatory scheme, the need for national uniformity, or the potential for conflict between administering federal and state programs. *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956).

Locomotive Boiler Inspection Act

CSXT argues that the LBIA preempts Rule 460.1473(a) because in the LBIA Congress intended to occupy the entire field of locomotive equipment regulation as determined by the Supreme Court in *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926). Defendants and amicus respond that *Napier* is no longer good law because the FRSA has impliedly superseded the LBIA.

The LBIA, 45 U.S.C. § 23, provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive,

its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may prescribed in the rules and regulations hereinafter provided for.

In *Napier* the Court held that LBIA preempted a Georgia state statute requiring automatic doors on locomotive fireboxes and a Wisconsin statute requiring locomotive cab curtains. The Court recognized that the LBIA comprehensively empowered the Interstate Commerce Commission [authority now resident with the Secretary of Transportation and the Federal Railroad Administration, 49 U.S.C.App. §§ 103 and 1655(e)(1)(E)] to promulgate regulations regarding material, construction, and design of locomotives and all their appurtenances in order to enforce compliance with the LBIA. *Napier*, at 609, 47 S.Ct. at 208. The Court also noted that no federal regulation existed as to the specific items, fire-box doors and cab curtains, that the state regulation required. However, the Court determined that Congress intended the LBIA to occupy the entire field of locomotive equipment and consequently the LBIA preempted the state legislation, *Napier*, at 612-613, 47 S.Ct. at 209-10.

Even though *Napier* was decided in 1926, contemporary federal courts continue to accept it as binding precedent recognizing that Congress intended that the LBIA would occupy totally the field of locomotive equipment and preempt any state regulation of it. Further, this Court is unaware of any federal court authority overruling *Napier*. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), *Missouri Pacific Railroad Co. v. Railroad Commis-*

sion of Texas, 833 F.2d 570 (5th Cir.1987), *Consolidated Rail Corp. v. Pennsylvania Public Utility*, 536 F.Supp. 653 (E.D.Pa.1982), *aff'd mem.*, 696 F.2d 981 (3rd Cir.1982), *aff'd mem.*, 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983). Moreover, the various authorities proffered by defendants are neither binding precedent on this Court nor reasonably persuasive.

This Court is similarly convinced that in the LBIA Congress clearly manifested its intent to fully occupy the field of locomotive equipment regulation by employing language providing for "rules and regulations" covering a "locomotive, its boiler, tender, and all parts and appurtenances thereof."

Defendants contend that the FRSA, passed subsequently to the LBIA, indicates an unambiguous change in Congress' alleged intent to occupy the field of locomotive equipment regulation. Defendants refer to the legislative history of the FRSA identifying its primary purpose to "promote safety in all areas of railroad operations" and calling "for broadscale Federal legislation with provisions for active State participation to assure a much higher degree of railroad safety in the years ahead." H.R.Rep. No. 1194, 91st Cong., 2d Sess. 19-20 (1970), *reprinted in* 1970 U.S.Code Cong. & Admin.News 4104-4105. (Report 1194, with cites to USSCAN).

CSXT, however, notes that Report 1194, at 4113-4114, underscores the continuing effect of existing federal railroad safety law when commenting on § 202 of the FRSA:

> The committee added the words "supplementing provisions of law and regulations in effect on the date of enactment of this title" to the Secretary's rulemaking authority to make clear that this grant of jurisdiction does not replace the existing rail safety statutes and implementing regulations transferred to the Department of Transportation. . . . It is the committee's intent that those existing statutes will continue to be enforced and administered by the Department in their respective area and that

> the new authority will be implemented with respect to those areas of rail safety not now subject to Federal jurisdiction. In other words, it is the intent of the committee that the existing statutes continue to be administered and enforced as if this legislation had not been enacted.

Since the LBIA was in effect on the date of the FRSA's enactment, this legislative history indicates that Congress did not intend that the FRSA would supersede the LBIA.

This Court acknowledges that in the LBIA Congress intended to occupy the field of locomotive equipment regulation, as recognized in *Napier*, and determines that the FRSA did not impliedly modify the LBIA. Consequently, this Court determines that the LBIA preempts Rule 460.1473(a) insofar as it may be construed to require commodes on locomotives operating in Michigan.

Federal Railroad Safety Act

CSXT claims that the FRSA preempts Rule 460.1473(a) because the rule attempts to regulate the same subject matter as the FRSA, does not qualify under the FRSA's provision for limited state regulation. Defendants and amicus argue that the FRSA specifically provides for state regulation such as Rule 460.1472(a).

The FRSA, § 205, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not

incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

This Court recognizes that Congress prefaces this section with its policy declaration that railroad safety laws "shall be nationally uniform to the extent practicable." This Court further notes that Congress provides for individual state regulations relating to railroad safety until a federal regulation is promulgated covering the "subject matter" of the state regulation. CSXT asserts that "subject matter" should be construed as regulable categories, such as, locomotive equipment. Defendants and amicus maintain that "subject matter" should be narrowly construed to mean particular and specific items, such as, sanitary facilities on locomotives. The pivotal issue is the scope of the phrase "subject matter."

This Court acknowledges Congress' explicit statement that railroad safety laws should be as nationally uniform as practicable. This reasonably suggests that the "subject matter" under state regulation should be circumscribed and distinct from the "subject matter" under federal regulation. Nevertheless, Congress does provide for additional or more stringent state regulation of a federally regulated "subject matter" in order to eliminate or reduce an "essentially local safety hazard." But that is not the present case as the parties themselves recognize.

Congress' mandate of national uniformity also logically implies a broad construction of the term "subject matter" as a category, class, or group, rather than a specific, particular, or individual item. If "subject matter" were construed narrowly as item specific, then states would be free to interstitially impose a myriad of gap filling safety regulations in areas where Congress may have regulated comprehensively, although not exhaustively. This approach would promote piecemeal, ad hoc, and fragmentary regulation, and, thereby, effectively destroy national uniformity.

This Court acknowledges and endorses the rationale of *Norfolk and Western Ry. Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich. 1984). In *Burns* the court determined that the FRSA preempted state regulation of railroad walkways because walkways comprised an unspecified part of the general track structure, which was a federally regulated "subject matter." The *Burns* court recognized the potential "subject matter" conflict arising from Congress' intent to provide uniform railway safety regulations and the states' limited right to regulate for safety:

> To the degree that this pronouncement suggests federal preemption, it is equally important to note that the matter of permissible state regulation is specifically addressed. First, it is clear that there can be no preemption unless the Secretary has actually adopted a railroad safety standard. *That does not necessarily mean that the standard adopted must detail every conceivable item that might be contemplated thereby;* but, at least, there has to be some action generally indicating that the Secretary is acting pursuant to the powers vested in him by Congress. (emphasis added)

Burns, at 164.

In the instant case, federal regulations exist comprehensively governing locomotive design and equipment. Railroad locomotive safety standards are extensively specified in 49 C.F.R. §§ 229.1-229.141 (1987) detailing numerous individual items of locomotive equipment. This Court recognizes the expansive range and comprehensive scope of these safety standards for locomotive design and equipment. This Court also acknowledges that locomotive commodes do not appear as specific regulated items. Nevertheless, this Court determines that the phrase, "subject matter," is most reasonably construed broadly as a category, group, or class because of the comprehensive scope and character of existing federal locomotive safety regulations. Even though these comprehensive federal regulations do not exhaustively "detail every

conceivable item that might be contemplated," they, in fact, define a category of "subject matter" by their scope and range of which this Court determines that locomotive commodes are part and parcel. Therefore, the existing comprehensive federal regulation of locomotive equipment, which this Court recognizes as constituting a category, class, group, or field of "subject matter" under the FRSA, § 205, preempts state regulation requiring locomotive commodes.

CONCLUSION

Accordingly, this Court determines that the LBIA and the FRSA each preempt Rule 460.1473(a) insofar as it is construed to require commodes on locomotives operating in Michigan.

APPENDIX E

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E. RELEVANT SECTIONS
MICHIGAN ADMINISTRATIVE PROCEDURES ACT

CHAPTER 4. PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec.71.(1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

* * *

24.272 Defaults; written answers; evidence; arguments; cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

History: 1969, Act 306, Eff. July 1, 1970.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

History: 1969, Act 306, Eff. July 1, 1970;-AM. 1970, Act 40, Imd. Eff. July 1, 1970.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74.(1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

History: 1969, Act 306, Eff. July 1, 1970.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

* * *

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

History: 1969, Act 306, Eff. July 1, 1970.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or

its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.278 Stipulations; disposition of cases, methods.

Sec. 78.(1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1,1970.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined

Sec. 80.(1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested

case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970;-Am. 1984, Act 28, Imd. Eff. March 1, 1984;-Am. 1984, Act 196, Imd. Eff. July 3, 1984.

24.281 Proposals for decision; contents.

Sec. 81.(1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make finding of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or thepublic service commission insofar as the case involves rate-making or financial practices or conditions.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.285 Final decisions and orders.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof objections and ruling thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

* * *

(4)

FILED

MAR 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CSXT, INC.,

Petitioner,

vs.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN

and

UNITED TRANSPORTATION UNION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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42 PP

QUESTIONS PRESENTED

(Petitioner is satisfied that the questions presented in its Petition fully encompassed its appeal. However, State Respondents' Brief totally changes the State's prior position that the Michigan Department of Transportation's (MDOT) Rule requires toilets on locomotives in Michigan. As a result, Petitioner is compelled to submit the following additional question.)

V. Whether MDOT, having contended in administrative proceedings, the District Court and the Court of Appeals that its Rule requires toilets on locomotives in Michigan, may in this Court reverse its position and argue that the Rule is subject to other interpretations which, if true, may defeat Petitioner's assertion of a "facially conclusive" preemption challenge.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is fully set forth at pp. 4-5 of the Petition.

ARGUMENT

I

MDOT'S RULE 460.1473(a) REQUIRES TOILETS ON LOCOMOTIVES IN MICHIGAN

Both MDOT and Respondent United Transportation Union (UTU) recognize that a key issue in this Court's granting CSXT's Petition for Certiorari is whether abstention is appropriate to a facially conclusive preemption claim. They now argue that Michigan's Rule 460.1473(a) is not specific, is subject to other interpretations and may not apply to locomotives.

This is a total change of position by MDOT. Never, at any stage of this case, has MDOT denied that its Rule 460.1473(a) requires toilets on locomotives. MDOT has affirmatively stated many times in the District Court and the Court of Appeals that its Rule does require toilets on locomotives. As a result, Petitioner must reply and supplement its Petition Appendices to demonstrate the plain meaning of Rule 460.1473(a) and MDOT's complete departure from its previous position in this case up to this time.

In the lower courts, all parties in prior pleadings and briefs have referred only to one section of Michigan's rules respecting sanitation and shelter for railroad employees.

This Section, R-460.1473, states:

Section 3—Running facilities.

(a) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

Because MDOT never before challenged that R460.1473(a) required toilets on all locomotives, nothing more was needed. MDOT and CSXT knew what the Rule meant

and said so. MDOT's attempted change of position makes it now necessary to set out the definitions and other sections applicable to the Rule. The entire "Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees" is appended hereto as Appendix A. (MICH. ADM. CODE, Rules 460.1471 through 460.1481).

"Running facilities" are defined in Section 1 as sanitation or shelter facilities on *"engines, trains or cabooses"*. (Emphasis added). Engines are locomotives. The terms are used interchangeably in these Rules (See Appendix A, p. A-4, Section 3(e)).

Further, the rules are divided into sections clearly describing the various types of railroad facilities and the sanitation and shelter requirements for each. "Running facilities" are engines, trains and cabooses. "Localized facilities" relate to fixed location duty points. "Crossing watchmen facilities, Camp facilities" and "Section Houses" are each separately defined and regulated. (See Appendix A, pp. A-2, A-4, A-5, A-6).

The rules require various and different sanitation items depending on the nature of the railroad work and facility defined. For locomotives, toilet facilities are required. This was clear to MDOT's Administrative Law Judge when she stated "Rule 460.1473 is specific and to the point,---" (Petition Appendix G-18). It was also clear to the District Court Judge when he stated that MDOT "argued its position assuming that enforcement of Rule 460.1473(a) would require equipping locomotives with commodes." (Petition Appendix D-3). Finally, it was clear when the District Court concluded:

> Accordingly, this Court determines that the LBIA and the FRSA each preempt Rule 460.1473(a) insofar as it is construed to require commodes on locomotives operating in Michigan. (Petition Appendix D-10)

In the face of the plain language of the Rule, MDOT's administrative action shown in Petition Appendix G and MDOT's prior consistent position throughout this case, it is folly

to say to this Court at this time that the Rule may not require toilets on locomotives. It simply cannot be said that a rule requiring adequate toilet facilities on engines, trains or cabooses (i.e. running facilities) can be satisfied by providing toilets "off the train entirely". (State Respondent's Brief, p. 29).

Beyond the Rule itself, this case, from its inception, has dealt with toilets on locomotives. UTU's Complaint and MDOT's administrative proceedings make this crystal clear.

UTU's first complaint to MDOT (Petition Appendix G-1 and G-2) complains that the railroad has put into use engines which are "in violation of the Department's Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees.---These SCL engines do not have toilets---".

MDOT then gave notice of an inspection based on the UTU Complaint of alleged violation of the Department's Rules and Regulations Relating to Sanitation and Adequate Shelter for Certain Railroad Employees --- "when SCL engines are put into use that do not have toilets ---". The Notice included the request that the railroad company have SCL locomotives available for inspection. (Petition Appendix G-3 and G-4).

Next, MDOT issued its Report Transmittal and Report of Inspection, each under the case heading referring to alleged violation of the Department's Rules and Regulations by the railroad---"when SCL engines are put into use that do not have toilets" etc. The Report of Inspection makes four specific recommendations:

> Therefore the following recommendations are made and The Chesapeake and Ohio Railway Company shall:
>
> —Upon the first quarterly maintenance of any engine being used in Michigan, equip same with the proper toilet facilities and equipment as specified in the Department's Rules and Regulations (those conditions being found in SCL Unit 6667 acceptable);

—Provide a copy of its written instructions pertaining to the installation of the necessary facilities and equipment to this office within 30 days;

—Provide to this office a written statement as to an anticipated completion date of work on all engines being used in Michigan;

—In the interim, issue instructions to its employees limiting the use of any engine not properly equipped to trailing units only in a yard where toilet facilities are available. Provide a water cooler with cool water and drinking cups on same. Send copy of bulletin to this office. (Petition Appendix G-6—G-10).

MDOT's Report Transmittal contains the following directive:

Written confirmation of compliance to the recommendations contained in the subject report shall be provided to this office. (Petition Appendix G-7).

Next, MDOT's Administrative Law Judge issued a Notice of Hearing under the following heading:

In the matter of Complaint by the United Transportation Union and the Brotherhood of Locomotive Engineers of violation of Michigan Department of Transportation Rule No. R 460.1473(a) by absence of toilets as sanitary facilities on CSX Transportation, Inc. locomotives used in Michigan. (Petition Appendix G-12)

Finally, MDOT's Administrative Law Judge issued an Order denying CSXT's Motion to Stay Administrative Proceedings under the same case heading cited above. In that Order are two statements particularly applicable here:

Rule 460.1473 is specific and to the point, and since it promotes the health, safety and welfare of the citizens of this state, its passage and enforcement are well within the police powers of the State of Michigan. (Petition Appendix G-18 and G-19).

The specific Rule involved in this action does not relate to the *mechanical operation of a locomotive nor to any*

> *appurtenances, but to sanitary facilities* normally available to travelers and not available on the route taken by railroads. (Petition Appendix G-19). (emphasis added).

The conduct and writings of UTU and MDOT in these administrative proceedings speak volumes. The Rule requires toilets on locomotives and both UTU and MDOT were determined to have toilets on all CSXT locomotives used in Michigan.

To summarize, the Union complained that some CSXT locomotives in Michigan did not have toilets. Based on the Complaint, MDOT held an Inspection and recommended that CSXT shall equip, with proper toilet facilities and equipment, as specified in MDOT's rules and regulations, any engine being used in Michigan. MDOT further required that CSXT provide it with written instructions pertaining to the installations, a written statement as to the anticipated completion date of work on all engines being used in Michigan and that CSXT issue instructions to its employees limiting the use of any engine not properly equipped. MDOT required written confirmation of compliance with those recommendations. MDOT's Administrative Law Judge commenced a formal proceeding on the UTU Complaint of violations of MDOT's Rule 460.1473(a) *by absence of toilets as sanitary facilities on CSXT locomotives in Michigan.*

After all this, we are now told by MDOT (as well as by UTU) that this Rule does not require toilets on locomotives. Indeed, we are told that it may relate to toilets along the tracks and off the train entirely. It is clear from the administrative proceedings, that until abstention became an issue and with it the threat to Respondents of a "facially conclusive preemption claim", both MDOT and UTU, along with CSXT, were satisfied that Michigan's Rule required toilets on all locomotives.

If any doubt at all remains as to MDOT's interpretation of the Rule, CSXT has attached hereto as Appendix B and Appendix C portions of briefs filed by MDOT in the District

Court and in the Court of Appeals. In the District Court brief, under INTRODUCTION AND SUMMARY OF ARGUMENT, are found the following two statements:

> The State of Michigan, Department of Transportation, requires railroads to make available on their locomotives adequate toilet facilities for the health and welfare of their trainmen, enginemen and yardmen.
>
> In the case at bar, the State of Michigan has acted to further railroad safety and to promote the health and welfare of its citizens by adopting a rule requiring toilets on locomotives. (Appendix B, p. B-2).

On the last page of this brief, under CONCLUSION AND REQUEST FOR RELIEF is the following statement:

> Rule 460-1473(1) requiring toilets on locomotives relates to railroad safety. (Appendix B, p. B-4).

Similarly, in its Brief of Defendants-Appellants filed with the Sixth Circuit Court of Appeals, MDOT again affirmatively and without equivocation restated its position that its Rule required toilet facilities on locomotives. In the TABLE OF CONTENTS (Appendix C, p. C-2) MDOT's arguments are entitled as follows:

I. MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT BECAUSE NO FEDERAL RULE HAS BEEN ADOPTED COVERING THE SAME SUBJECT MATTER

II. MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES IS NOT PREEMPTED BY THE BOILER INSPECTION ACT BECAUSE THE BOILER INSPECTION ACT DOES NOT APPLY TO SANITARY FACILITIES AND BECAUSE THERE IS NO FEDERAL RULE COVERING THE SAME SUBJECT MATTER

The first sentence of the brief states:

> This case is an appeal from the United States District Court's entry of a permanent injunction restraining the Michigan Department of Transportation (hereinafter referred to as the "Department") from enforcing its administrative rule requiring adequate sanitary facilities on locomotives and a judgment declaring Michigan's rule preempted by federal law. (Appendix C, p. C-6).

After STATEMENT OF FACTS is found:–

1. The Michigan Department of Transportation's Rule was duly promulgated and requires railroads to make available on their locomotives adequate sanitary facilities for the health and welfare of their trainmen, enginemen and yardmen. (Appendix C, p. C-10).

At the end of the brief, under CONCLUSION AND REQUEST FOR RELIEF, MDOT says:

> Rule 460.1473(1) requiring toilets on locomotives relates to railroad safety. (Appendix C, p. C-13).

Based on the foregoing, Petitioner asks this Court to hold Respondent MDOT to its established position that its Rule requires toilets on locomotives in Michigan. This done, Petitioner's preemption claim remains facially conclusive and abstention is not warranted.

II

THE COURT OF APPEAL'S FAILURE TO ASSESS CORRECTLY THE TOTAL PREEMPTIVE EFFECT OF LBIA AND FRSA AS TO LOCOMOTIVE EQUIPMENT UNDER THE UNDISPUTED FACTS OF THIS CASE VITALLY AND ADVERSELY AFFECTS PETITIONER'S FACIALLY CONCLUSIVE PREEMPTION CLAIM

Both UTU and MDOT would have this Court ignore two holdings of the Court of Appeals as irrelevant and related to preemption rather than abstention. Those holdings were vital to the Court of Appeal's ultimate application of *Younger* abstention to Petitioner's preemption claim.

First, the Sixth Circuit held that "[t]he Act [LBIA, 45 USC §22-43] *does not prohibit concurrent state regulation* or purport to occupy the field of railroad [regulation]." (Emphasis added). Next, the Court held that the Federal Railroad Safety Act (FRSA), 45 USC §421-44, allows limited concurrent state regulation. (Petition Appendix B, p. B-4). Obviously, one cannot present a facially conclusive preemption claim if the involved federal law permits concurrent state regulation of the same subject.

The problem with the Court of Appeals finding here is that the LBIA regulates only locomotive equipment and *does* prohibit concurrent state regulation of locomotive equipment. (See *Napier* vs. *Atlantic Coastline*, 272 US 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926), and cases cited in the Petition, pages 6, 7 and 8).

This same reasoning applies to the Circuit Court's treatment of FRSA. Obviously, FRSA does allow state regulation until the Secretary of Transportation has adopted a rule, regulation, order or standard covering the subject matter of the state requirement. When the "subject matter" has been covered by such a federal rule, FRSA *does prohibit* concurrent statewide regulation. Petition Appendix E, the Federal Railroad Administration Locomotive Safety Standards, are the federal rules covering the *subject matter* of Michigan's Rule requiring toilets on locomotives. (See Petition, p. 11).

Once the Court of Appeals incorrectly concluded that there was room for concurrent state regulation of locomotive equipment under both the LBIA and FRSA, there was no need for it to consider whether *Younger* abstension should apply to a facially conclusive preemption claim.

The Circuit Court's incorrect assessment of the total preemptive effect of LBIA and FRSA in this case must be corrected before this Court can determine whether the Sixth Circuit erred in finding *Younger* abstention appropriate here.

III

MDOT'S ADMINISTRATIVE PROCEEDINGS WERE NOT "JUDICIAL IN NATURE"

Both Respondents' argue that Michigan's constitutional separation of powers does not prevent MDOT's administrative proceedings from rising to the level of "judicial in nature". The provisions of Michigan's Administrative Procedures Act (MCLA §24.271-24.282, 24.285-24.287) do not change the fact that MDOT is expressly denied judicial powers by Michigan's Constitution. Respondents' reliance on *Prentis* vs. *Atlantic Coastline Company,* 211 US 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908), fails. The state agency in *Prentis* was the Virginia State Corporation Commission which, under Virginia law, was vested with both legislative and judicial powers. Such is not the case with MDOT.

Finally, both MDOT and UTU ignore *Detroit & Mackinaw Railway* vs. *Michigan Railway Commission,* 235 US 403 (1914), wherein Michigan's Constitution with its separation of powers was contrasted with Virginia's (Prentis) which affirmatively granted dual powers. (See Petition, pp. 16-17).

The Michigan statutes cited in Petition Appendix F demonstrate the absence of judicial power in MDOT. A *judicial proceeding* in a court is required to enforce MDOT's rules and orders.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth in the Petition and in this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

RULES AND REGULATIONS RELATING TO SANITATION AND ADEQUATE SHELTER FOR CERTAIN RAILROAD EMPLOYEES

By authority of Act No. 3, Public Acts of 1939, as amended [CL 1948, §460.1]

R 460.1471. Section 1—Definitions

The words and phrases used herein shall be construed as follows, unless the context shall otherwise require:

(a) The term "localized facilities," when used herein, shall mean those facilities of sanitation or shelter for the welfare and health of railroad trainmen, enginemen and yardmen, which facilities are to be maintained at points where employees are required to report for duty or are relieved from duty.

(b) The term "highway crossing shanty," when used herein, shall mean a building at which public highway crossing watchmen are regularly stationed for performance of their duties.

(c) The term "running facilities," when used herein, shall mean those facilities of sanitation or shelter to be maintained on engines, trains or cabooses for the welfare and health of railroad trainmen, enginemen and yardmen.

(d) The term "camp facilities," when used herein, shall mean those facilities of sanitation or shelter for the welfare and health of maintenance of way employees, when such facilities are to be maintained at railroad camps of a permanent or seasonal nature, or are located in movable cars when used for housing maintenance of way employees.

(e) The term "crossing watchmen," when used herein, shall include such employees as are used in the flagging of public highway crossings or in the actual operation of manually controlled gates, public highway crossing signals, or other appurtenances having to do with the protection of such crossings.

(f) The term "section house facilities," when used herein, shall mean the shelter facilities maintained for maintenance of way employees at points where such employees report for duty or are relieved from duty.

HISTORY: ACS 18, p. 45.

R 460.1472. Sec. 2—Localized facilities

Adequate localized facilities, as defined in section 1 (a) hereof, consisting, as in each location may be necessary, of the following facilities, installed and maintained as specified, shall be furnished by all railroad companies under the jurisdiction of this commission, if, in the judgment of the commission, such facilities, or any of them, are necessary for the welfare and health of the above mentioned employees:

(a) There shall be provided a locker room, separate from the toilet room by solid partitions, where the employees may change their clothing. The area of such room shall not be less than 80 square feet of clear floor space for 10 employees, and adequate space to be added for additional employees.

Necessary benches and tables shall be provided.

(b) Where lockers are not now provided, a sufficient number of metal lockers shall be provided, the dimensions of which shall not be less than 72 inches high, 15 inches wide and 18 inches deep, save that, in such locations where larger lockers shall be deemed necessary, they shall be provided as shall be agreed to between the railroad company and its employees. Said lockers shall be equipped on the inside with a top shelf, and not less than 1 clothes hook on each side, a hanger bar, and also sufficient openings in the door for the purpose of ventilation.

(c) Where running water and sewers are reasonably available or where physical conditions and ordinances permit the use of septic tanks in lieu of sewers, hot and cold running

water, sufficient wash bowls and shower facilities, and flush toilets in accordance with the following minimum requirements, shall be provided:

Number of Persons	Number of Toilets
1 to 10	1
11 to 24	2
25 to 49	3
50 to 100	5
100 or over	1 for each additional 25 persons

(d) Wherever urinals are provided, 1 urinal may be substituted for 1 toilet, provided the number of toilets shall not be reduced to less than ⅗ the number shown in the above table.

(e) If practical, every toilet room shall be so located as to open to the outside light and air by windows or skylights.

(f) All inside toilet facilities shall be made of materials impervious and resistant to moisture, and shall be fitted with individual flush systems. In the case of urinals, the water may be allowed to run continuously.

(g) The walls of compartments or partitions between toilet fixtures may be less than room height, but the top shall not be less than 5 feet from the floor and the bottom not more than 1 foot from the floor.

(h) An adequate supply of cool, sanitary water, satisfactory for drinking purposes, shall be made available to all employees. Where necessary, this water shall be provided in suitable sanitary containers, conveniently placed for the use of the above mentioned employees, and each container will be equipped with a faucet or other dispenser. The company shall furnish individual drinking cups.

(i) Locker and toilet rooms shall be adequately heated, ventilated, lighted, and provided with screens, and said facilities shall be kept reasonably clean by the employer.

HISTORY: ACS 18, p. 46.

R 460.1473. Sec. 3—Running facilities

(a) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

(b) All yard diesels shall have the floors cleaned and the windows washed at reasonable intervals.

(c) All cabooses shall have the interior washed once each year. Road cabooses used on trains handling ore in open top equipment, and all yard and transfer cabooses, shall have the floors scrubbed or mopped once each month. Other road cabooses on any run shall have the floors scrubbed or mopped once each month, if the crew using same request it.

Windows on all cabooses shall be washed once a month, except in freezing weather.

(d) When required by the season of the year, doors and windows of cabooses shall be equipped with adequate metal stripping. Similarly, when required by the season of the year, cabooses shall be equipped with screen doors or screen panels, and windows on each side of each caboose shall be screened. Sliding screen windows, however, shall be deemed adequate.

(e) An adequate supply of cool, sanitary water, satisfactory for drinking purposes, shall be made available for the use of trainmen, enginemen and yardmen. Suitable sanitary containers, equipped with a faucet or other dispenser, shall be maintained on cabooses and locomotives, and individual drinking cups shall be furnished by the company.

(f) Every caboose used in any train in this state, regardless of service, shall be provided with a stove or other adequate means of heating. A sufficient amount of fuel for the trip or shift shall be made available.

(g) Baggage and express cars, when occupied by employees coming under the provisions of this act, will be so arranged

in the train that employees required to ride such cars will have access to the drinking water, toilet and washing facilities provided in a coach in said train; and, if it is found impractical to so arrange said cars in the train, then drinking water, toilet and washing facilities must be furnished for the employees riding said cars upon formal order of and by the commission.

HISTORY: 1944 ACS 18, p. 46; 1954 AC, p. 6324; 1954 ACS 1, p. 35.

R 460.1474. Sec. 4—Crossing watchmen facilities

(a) Adequate shelter shall be furnished for crossing watchmen, and said shelter shall be properly sealed and insulated against cold, and heated.

(b) If, in the judgment of the commission, it is practical, toilet and washing facilities will be furnished as the commission may require, after inspection and agreement or hearing in the matter.

HISTORY: ACS 18, p. 47.

R. 460.1475. Sec. 5—Camp facilities

(a) When employees are furnished meals in camp cars, as hereinbefore defined, adequate sanitary facilities and space shall be provided.

(b) Where cars, other than passenger coaches, are furnished for sleeping quarters, cars shall not house over 10 men each. Where passenger coaches are furnished, the commission may designate the number of men to be housed in each coach.

(c) All camp cars will be properly heated, ventilated, sealed and lighted, and, during the period of the year in which insects are prevalent, the doors and windows will be screened.

(d) All extra and permanent gangs will be furnished with shower car, with running hot and cold water. Adequate toilet facilities will be furnished for all employees.

(e) Camp man or janitor will be furnished for all gangs over 20 men for the purpose of keeping the cars and grounds in a clean and sanitary manner.

(f) When extra and permanent gangs are furnished with kitchen car or cars, the same shall be well equipped with adequate kitchen facilities. Such kitchen cars shall be maintained in a clean and sanitary condition.

HISTORY: ACS 18, p. 47.

R 460.1476. Sec. 6—Section houses

Adequate shelter facilities, located in section houses or other suitable buildings, consisting, as in the individual case may be necessary, of the following appliances, installed and maintained as specified, shall be furnished by all railroad companies under the jurisdiction of this commission for regularly assigned maintenance of way employees, at points where such employees are required to report for duty or are relieved from duty, as, in the judgment of the commission, after investigation, and hearing, if requested, such facilities, or any of them, are necessary for the welfare and health of the above mentioned employees:

(a) There shall be provided space, adequate for the number of employees using said facilities, where employees may change their clothing, furnished with tables and benches or chairs, in accordance with the number of employees using the facilities. Where lockers are not now provided, and the same are requested by the employees using the individual facility, a sufficient number of metal lockers shall be provided to meet the requirements of said employees.

(b) During the period of the year in which insects are prevalent, screens will be furnished for the windows and doors.

(c) The space designated as shelter will be partitioned, sealed and adequately heated and lighted.

(d) Where running water and sewerage facilities are reasonably available, flush toilets and washing facilities will be provided. Otherwise, an outside toilet will be furnished and maintained in accordance with the provisions of section 7:

Provided, however, The provisions of this sub-section shall not be applicable where toilets and washing facilities are otherwise made reasonably available for maintenance of way employees.

(e) If necessary, a sufficient supply of running or well water will be made reasonably available, and individual drinking cups will be furnished.

HISTORY: ACS 18, p. 47.

R 460.1477. Sec. 7—Construction and maintenance of outside toilets when used by employees coming under the provisions of this act.

(a) The commission may, after proper investigation, hearing and order in the matter, permit the installation and maintenance of outside toilet facilities, where it is found otherwise impractical to install inside toilets and urinal facilities.

(b) Where outside toilets are installed and maintained in accordance with the above paragraph, they shall be located on ground that is well drained, and where there is no possibility of contaminating any drinking water supply.

(c) Suitable approach, such as concrete, gravel, or cinder walk, shall be provided.

(d) All windows, ventilators, and other openings, except doors, shall be screened to prevent the entrance of insects. A separate ventilator duct, with hood, shall be provided for the vault, and shall extend above the roof.

(e) The entire installation must be kept clean and sanitary. Milk of lime (freshly slaked lime), or other equally effective disinfectant, shall be used in the vault and in the urinal trough, in sufficient quantities and at frequent intervals. The floors, seats and urinals must be scrubbed as often as necessary.

HISTORY: ACS 18, p. 48.

R 460.1478. Sec. 8

Any shelter and sanitary facilities which have been constructed and are presently being maintained in accordance with an agreement heretofore entered into between the parties in interest, and agreed to or ordered by the commission, shall be deemed a complete compliance with these rules and regulations, until such time as a specific complaint is filed with the commission claiming that, on account of changes made in the uses of the facilities, such facilities are inadequate: Provided, Nothing herein shall be construed to abrogate or limit any agreement between the interested parties now in effect which provides for better or more adequate facilities, or to prevent the negotiation of such an agreement in the future.

HISTORY: ACS 18, p. 48.

R 460.1479. Sec. 9

Any railroad company being of the opinion that the application or enforcement of this order, or any part thereof, at any particular place, will be unjust or unreasonable, may apply to the commission for relief therefrom, and the commission may, by written order, relieve said railroad company from the application of this order, or any part thereof, at such place, or modify the same in such manner and to such extent as shall be just and reasonable.

HISTORY: ACS 18, p. 48.

R 460.1480. Sec. 10

In the absence of specific complaint, present facilities shall be deemed adequate. In the event of a complaint filed hereafter in respect of such facilities, and the commission shall find the same inadequate, the railroad company involved shall have a reasonable time in which to complete the work required in the light of the then existing situation, circumstances and conditions.

HISTORY: ACS 18, p. 48.

R 460.1481. Sec. 11

In the event of any dispute or disagreement between any employee and any employer as to the intent, meaning and interpretation of any or all of the rules hereinabove set forth, the commission reserves unto itself the right to set a hearing thereon, and to issue appropriate order or orders, so as to effectuate and carry out the intent and purpose of said rules.

HISTORY: ACS 18, p. 48.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CSXT, INC.
a Virginia Corporation,

Plaintiff,

Case No. L88-17CA5
HON. ROBERT HOLMES BELL

v

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan and The Department of Transportation of the State of Michigan,

Defendants,

and

UNITED TRANSPORTATION UNION,

Intervening Defendant.

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STATE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Michigan, Department of Transportation, requires railroads to make available on their locomotives adequate toilet facilities for the health and welfare of their trainmen, enginemen and yardmen. CSXT operates its railroad system within the State of Michigan utilizing locomotives that have no toilets. Seeking to avoid the State of Michigan's enforcement of its rule against CSXT, the Railroad enlists the aid of this Court to declare the State's rule preempted by two Acts of Congress: the Boiler Inspection Act of 1911, as amended in 1915, and the Federal Railroad Safety Act of 1970.

In any preemption case, the Court's task is to ascertain whether it was the intent of Congress to totally occupy the field in which the State has acted. *In the case at bar, the State of Michigan has acted to further railroad safety and to promote the health and welfare of its citizens by adopting a rule requiring toilets on locomotives.* The question facing this Court, therefore, is whether it is the intent of Congress to totally occupy the field of railroad safety so as to displace the State police power so exercised.

The two acts proffered by CSXT as a basis for finding such a total occupation both deal with railroad safety. The 1911 Act, as amended in 1915, is strictly limited to locomotive safety. None of the Act's sections address preemption and no legislative history is available to examine. One 1926 opinion of the United States Supreme Court sheds the only light on the issue in which the Court found a total occupation of the field of locomotive safety based on the statutes in force at that time.

In contrast, recognizing that the amended 1911 Act had served well, but was too limited in scope, Congress passed the 1970 Act to comprehensively address the entire field of railroad safety. In doing so, it expressly assigned a role to the States in this area and provided a detailed legislative history leaving no question about its intent.

CSXT urges this Court to preempt the State's rule on the basis of a 1926 case guessing at the intent of a 1915 Congress.

The State Defendants, on the other hand, urge this Court to be guided by Congress' own statement of its intent more recently expressed in an unambiguous 1970 statute, which will compel the conclusion that the State of Michigan's rule is *not* preempted and should be declared enforceable against CSXT. Support for this conclusion is set forth below, beginning with analysis of the Federal Railroad Safety Act, followed by examination of the Boiler Inspection Act.

LAW AND ARGUMENT

A.

MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT BECAUSE NO FEDERAL RULE HAS BEEN ADOPTED COVERING THE SAME SUBJECT MATTER

Michigan's Rule appears in the 1979 Michigan Administrative Code as follows:

> "R 460.1473 Running facilities.
>
> "Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." 1979 AC, R 460.1473(1) (hereinafter referred to as Rule 460.1473(1)). (A copy of Rule 460.1473(1) is attached hereto as Appendix A.)

The first question presented is whether Rule 460.1473(1) is preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976).

CONCLUSION AND REQUEST FOR RELIEF

Congress must express in terms permitting no other conclusion its intent to preempt the historic police powers of the States when exercising its Federal commerce power. In 1926,

Congressional intent to preempt State police powers in the field of locomotive safety was inferred by judicial construction. In 1970, that inference was repudiated. In 1970, Congress expressed in clear and unmistakable terms its intent to *permit,* not *prohibit,* the exercise of State power to promote rail safety. Congress ordained that the States may adopt *"any"* rule "relating to railroad safety" unaddressed by specific Federal action.

Rule 460.1473(1) requiring toilets on locomotives relates to railraod safety. No Federal rule has been adopted covering the subject matter of locomotive sanitation. The conclusion is inescapable that Rule 460.1473(1) is not preempted. Any other construction turns the Federal Railroad Safety Act on its head.

For all the reasons stated above, the State Defendants respectfully urge that this Court enter its Order denying Plaintiff's Motion for Summary Judgment and instead granting judgment in favor of the Defendants declaring Rule 460.1473(1) valid and enforceable. In the alternative, Defendants request that this Court deny Plaintiff's Motion for Summary Judgment on the ground that further proceedings are needed to resolve genuine issues as to material facts.

Respectfully Submitted,

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Dated: April 8, 1988

APPENDIX C

APPENDIX C

88-1642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CSXT, INC., A Virginia Corporation
Plaintiff—Appellee

v.

District Court
File No. L88-17CA5

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan; NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan; DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN;
Defendants-Appellants

UNITED TRANSPORTATION UNION
Intervening Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN HONORABLE ROBERT HOLMES BELL

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

WHETHER MICHIGAN'S RULE REQUIRING SANITARY FACILITIES ON LOCOMOTIVES **IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT.**

II.

WHETHER MICHIGAN'S RULE REQUIRING SANITARY FACILITIES ON LOCOMOTIVES **IS PREEMPTED BY THE BOILER INSPECTION ACT.**

88-1642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia Corporation

Plaintiff-Appellee

v.

District Court
File No. L88-17CA5

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan; NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan; DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN;

Defendants-Appellants

UNITED TRANSPORTATION UNION

Intervening Defendant-Appellant

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

STATEMENT OF THE CASE

This case is an appeal from the United States District Court's entry or a permanent injunction restraining the Michigan Department of Transportation (hereinafter referred to as the "Department") from enforcing its administrative rule requiring adequate sanitary facilities on locomotives and a judgment declaring Michigan's rule preempted by federal law. The Plaintiff-Appellee CSXT, Inc. (hereinafter referred to as

"CSXT"), operates a railroad system in Michigan and other states. Defendant-Appellant James Pitz is the Director of the Department of Transportation and Defendant-Appellant Norma J. Fleming is Administrator of the Railroad Safety and Tariffs Division of the Michigan Department of Transportation (herein referred to collectively with the Defendant-Appellant Michigan Department of Transportation as the "State"). The Intervening Defendant-Appellant is a union representing the interests of rail workers.

State's Administrative Proceedings

The course of proceedings in this case began on January 6, 1988 when Hearing Officer Virginia A. Dean served on CSXT a Notice of Hearing scheduled for February 10, 1988, on separate complaints filed by the United Transportation Union (hereinafter referred to as "UTU") and the Brotherhood of Locomotive Engineers. [See R. 17: Affidavit of W. VanderVeer in Support of Plaintiff's Motion for Summary Judgment (hereinafter VanderVeer Affidavit), Ex A-7.] The complaints had been filed with the Railroad Safety and Tariffs Division of the Department alleging that certain CSXT locomotives operating in Michigan lacked toilet facilities (R. 17: VanderVeer Affidavit, Ex A-4) as required by Department Rule 460.1473(1) which appears in the 1979 Michigan Administrative Code as follows:

> "R 460.1473 Running facilities.
>
> "Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." [Hereinafter referred to as the "Department's Rule" or "Rule 460.1473(1)".]

On January 21, 1988, CSXT filed with the Department's Office of Administrative Law Hearings a Motion to Stay Administrative Proceedings on the ground that CSXT had filed

a suit for injunctive and declaratory relief in federal district court alleging that the Department's Rule was preempted by two acts of Congress. (See R. 17: VanderVeer Affidavit at p 4, ¶ 11.) A hearing was held on CSXT's Motion on January 27, 1988 before Hearing Officer Dean at which argument was presented by counsel for CSXT, the Department and one of the two complainants, UTU. (See R. 17: VanderVeer Affidavit at p 4, ¶ 12.) By order issued that same day, Hearing Officer Dean denied CSXT's Motion to Stay on the ground that no authority had been presented requiring deviation from the statutorily established administrative framework and on the further ground that administrative agencies were not authorized to pass on constitutional questions, such as the federal preemption argument advanced by CSXT. (See R. 17: VanderVeer Affidavit, Ex B.)

As set forth in more detail below, the State's administrative proceedings were never held, having been preliminarily enjoined by Order of the U.S. District Court entered on February 9, 1988 (R. 7) and later permanently enjoined by Judgment Order entered May 18, 1988 (R. 33).

U.S. District Court Proceedings

CSXT's Complaint for injunctive and declaratory relief was filed with the United States District Court for the Western District of Michigan, Southern Division, on January 22, 1988 and was assigned to the Honorable Robert Holmes Bell (R. 1). The Complaint contained three counts: Count I alleged the Department's Rule was preempted by the Federal Boiler Inspection Act, 45 U.S.C. § 22 *et seq:* Count II alleged the Department's Rule was preempted by the Federal Railroad Safety Act, 45 U.S.C. § 434; and Count III alleged the Department's Rule violated the Commerce Clause of the United States Constitution, Art I, § 8, clause 3 (R. 1).

On February 3, 1988, the UTU filed a Motion to Intervene as Intervening Defendant (R. 2). On February 4, 1988, CSXT

filed a Motion for Temporary Restraining Order, on which date UTU's Motion to Intervene was granted (R. 3, 5).

On that same date, the Trial Court entered an Order for Preliminary Injunction, restraining the Department from enforcing its Rule and from continuing the scheduled administrative proceeding until August 4, 1988 or until the Court's ruling on a Motion for Summary Judgment to be filed by Plaintiff (R. 7). The Court's Order also provided that the parties were to schedule oral argument on the Motion for Summary Judgment with the Court (R. 7).

On February 10, 1988, Intervening Defendant UTU filed a Motion to Abstain or Dismiss (R. 8). On March 8, 1988, CSXT filed its Motion for Summary Judgment, raising only two of the three grounds for relief set forth in its Complaint: preemption based on the Federal Railroad Safety Act and preemption based on the Boiler Inspection Act (R. 16). The State and the UTU filed their responses in opposition to CSXT's Motion, following which a hearing date of June 14, 1988 was agreed upon and set with the Court (R. 23, 24).

Disposition in Court Below

Prior to the date set for hearing, on May 18, 1988, the Court issued its Judgment Order granting CSXT's Motion for Summary Judgment, declaring the Department's Rule preempted by both the Boiler Inspection Act and the Federal Railroad Safety Act and enjoining further enforcement of the Rule insofar as it required commodes on locomotives (R. 33). The Court never expressly considered or ruled on UTU's Motion to Abstain (R. 33). The absence of a hearing on Plaintiff's Motion for Summary Judgment prevented the State from expressing on the record its intention to join with the UTU in its Motion to Abstain.

Both the UTU and the State filed appeals, which were consolidated by stipulation of the parties and Order of this Court.

Statement of Facts

There being no record testimony taken in the District Court, the facts of the case at bar primarily arise out of the procedural history of the case and have, for the most part, been set forth above.

The salient facts giving rise to the instant action, however, are undisputed and may be briefly stated as follows:

1. *The Michigan Department of Transportation's Rule was duly promulgated and requires railroads to make available on their locomotives adequate sanitary facilities for the health and welfare of their trainmen, enginemen, and yardmen.*

2. CSXT operates its railroad system within the State of Michigan, utilizing locomotives that have no sanitary facilities (R. 17: VanderVeer Affidavit at ¶ 5).

3. Assuming the validity of the Department's Rule, CSXT's activities fall directly within its scope.

4. The Department initiated proceedings seeking to enforce its Rule against CSXT.

5. CSXT resisted the Department's efforts by filing an injunctive action in U.S. District Court.

6. As of the date of entry of the District Court's Judgment Order, the State's police power to protect the health and welfare of its rail workers has been severely curtailed.

ARGUMENT

I. *MICHIGAN'S RULE REQUIRING TOILET FACILITIES ON LOCOMOTIVES* IS NOT PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT BECAUSE NO FEDERAL RULE HAS *BEEN ADOPTED COVERING THE SAME SUBJECT MATTER*

Michigan's Rule appears in the 1979 Michigan Administrative Code as follows:

> "R 460.1473 Running facilities.
>
> "Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition." 1979 AC, R 460.1473(1)

The first question presented in this appeal is whether the trial court erred in ruling that Rule 460.1473(1) is preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976).

The legislative history of the Railroad Safety Act makes clear that the "primary purpose" of the act is to "promote safety in all areas of railroad operations . . . ." H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* (1970) U.S. CODE CONG. & AD. NEWS 4104, 4104 (hereinafter referred to as "House Report No. 91-1194"). In describing the background and need for the new legislation, the Committee appraised the then existing safety statutes, including the Boiler Inspection Act, as too limited and recommended broadscale Federal and State action:

> " . . . *Consequently, there is a strong concensus which makes it appear clearly that the time is now here for broadscale Federal legislation with provisions for active State participation* to assure a much higher degree of railroad safety in the years ahead." House Report No. 91-1194 at 4105. (Emphasis added.)

The more expanded regulatory role assigned to the States is set forth in § 205 of the Federal Railroad Safety Act (45 U.S.C. § 434), which "authorizes States to regulate *in any area of railroad safety* until the Secretary [of Transportation] acts with respect to the *particular* subject matter." House Report No. 91-1194 at 4112. (Emphasis added.)

Section 205 of the Railroad Safety Act provides:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. § 434. (Emphasis added.)

Thus, while uniformity is important, the States unquestionably may act in those specific areas where the federal government has not acted.

The Trial Court examined § 205 of the Federal Railroad Safety Act and correctly concluded that analysis of the

CONCLUSION AND REQUEST FOR RELIEF

Congress must express in terms permitting no other conclusion its intent to preempt the historic police powers of the States when exercising its Federal commerce power. In 1926, Congressional intent to preempt State police powers in the field of locomotive safety was inferred by judicial construction. In 1970, that inference was repudiated. In 1970, Congress expressed in clear and unmistakable terms its intent to *permit*, not

prohibit, the exercise of State power to promote rail safety. Congress ordained that the States may adopt "*any*" rule "relating to railroad safety" unaddressed by specific Federal action.

Rule 460.1473(1) requiring toilets on locomotives relates to railroad safety. No Federal rule has been adopted covering the subject matter of locomotive sanitation. The conclusion is inescapable that Rule 460.1473(1) is not preempted. Any other construction turns the Federal Railroad Safety Act on its head.

For all the reasons stated above, the State respectfully urges this Court to enter its Order reversing the Trial Court's order granting Plaintiff's Motion for Summary Judgment, dissolving the permanent injunction entered incident thereto and instead granting judgment in favor of the Defendants declaring Rule 460.1473(1) valid and enforceable.

Respectfully submitted,

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